

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION  
CASE NO. 23-cr-80219-AMC

UNITED STATES OF AMERICA, Fort Pierce, Florida

Plaintiff, August 12, 2024

vs.

9:37 a.m. - 2:23 p.m.

MICHAEL GORDON DOUGLAS,

Defendant. Pages 1 to 164

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TRANSCRIPT OF MOTION TO SUPPRESS  
BEFORE THE HONORABLE AILEEN M. CANNON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

U.S. ATTORNEY'S OFFICE  
GREGORY SCHILLER, ESQ.  
500 S. Australian Avenue  
Suite 400  
West Palm Beach, Florida 33401

FOR THE DEFENDANT:

LAW OFFICES OF JOHN D. KIRBY, APC  
JOHN D. KIRBY, ESQ.  
401 W. A Street  
Suite 1150  
San Diego, California 92101

LAW OFFICE OF JOHN R. HOWES  
JOHN R. HOWES, ESQ.  
110 SE 6th Street  
Suite 1700  
Fort Lauderdale, Florida 3301

STENOGRAPHICALLY REPORTED BY:

LAURA E. MELTON, RMR, CRR, FPR  
Official Court Reporter to the  
Honorable Aileen M. Cannon  
United States District Court  
Fort Pierce, Florida

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**GOVERNMENT FOR IDENTIFICATION**

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Exhibit

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**DEFENDANT FOR IDENTIFICATION**

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NONE

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**GOVERNMENT ADMITTED EXHIBITS**

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Exhibit

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**DEFENDANT ADMITTED EXHIBITS**

Exhibit

Page

20

NONE

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1 (Call to the Order of the Court.)

2 THE COURT: Good morning. Please be seated unless you  
3 are addressing the Court.

4 Let's call the case.

5 COURTROOM DEPUTY: The United States of  
6 America v. Michael Gordon Douglas, case number 23-cr-80219.

7 Will the parties please make your appearance, starting  
8 with the government.

9 MR. SCHILLER: Good morning, Your Honor. Gregg  
10 Schiller on behalf of the United States, and with me at counsel  
11 table is Homeland Security Investigations Special Agent Aisha  
12 Rahman.

13 THE COURT: Good morning to you both.

14 AGENT: Good morning.

15 MR. KIRBY: Good morning, Your Honor. John Kirby on  
16 behalf of Mr. Douglas. He is present.

17 MR. HOWES: Good morning, Your Honor. John Howes as  
18 local counsel for Mr. Douglas. How are you today?

19 THE COURT: Good morning to all of you. I'm well.  
20 Thank you.

21 Good morning, Mr. Douglas.

22 THE DEFENDANT: Good morning, Your Honor.

23 THE COURT: This is a hearing, an evidentiary hearing,  
24 on three defense motions to suppress. There is also a  
25 government omnibus motion in limine which is set for hearing

1 today and will be addressed following the evidentiary portion  
2 of the hearing.

3 Let me first turn to Mr. Schiller. Given the number of  
4 motions and the issues that are presented, do you have a plan  
5 with respect to presentation of evidence?

6 MR. SCHILLER: Yes, ma'am, I do.

7 THE COURT: Okay.

8 MR. SCHILLER: In regards to the motions to suppress,  
9 first regarding docket entry 47 -- actually, let me back up.  
10 Docket entry 46, which is the motion to suppress the evidence  
11 seized from the vehicle, Counsel and I, based on the filing at  
12 docket entry 83, are going to stipulate to a summary of  
13 evidence that occurred -- everything leading up to the actual  
14 seizure of the vehicle, and then we will put on one witness,  
15 Homeland Security Special Agent Bonnie Myers, who will testify  
16 about the consent she received from the defendant's aunt.

17 So in regards to that, that's how we will proceed on  
18 that, and argue the legal availability to search the car.

19 THE COURT: Okay. This stipulated set of facts, are  
20 they memorialized in writing?

21 MR. SCHILLER: They are, ma'am. And they're  
22 memorialized in Government's Exhibit 60 at pages 2, 3, 4, 5, 6,  
23 7, and 8.

24 THE COURT: So 2 through 8?

25 MR. SCHILLER: Yes, ma'am.

1 THE COURT: And you're using the blue, file-stamped or  
2 the pages on the bottom? I guess there are no pages on the  
3 bottom. So you're referring to the --

4 MR. SCHILLER: Yes.

5 THE COURT: -- 2 through 8.

6 MR. SCHILLER: And, Judge, just so the Court knows,  
7 part of the reason why I don't put page numbers on there,  
8 because sometimes the pagination doesn't match up with the file  
9 stamp.

10 THE COURT: Okay. So the facts begin at the bottom of  
11 page 2 of ECF 60 --

12 MR. SCHILLER: Through the middle of page 8. With one  
13 caveat, Your Honor.

14 THE COURT: And what is the caveat?

15 MR. SCHILLER: At the bottom of page 7 is the paragraph  
16 regarding consent. So for that we will have the agent testify.

17 THE COURT: Okay. So does this mean that the only  
18 portion of evidence to be presented today would concern the  
19 disputed consent?

20 MR. SCHILLER: I believe so, Judge. Because I believe  
21 for every issue that we have, we are agreeing to what the facts  
22 are; we're just disagreeing on whether they are legally  
23 admissible or suppressionable.

24 THE COURT: Okay.

25 MR. SCHILLER: I don't want to speak for Mr. Kirby, but

1     that's the conversations we have had.

2             THE COURT:   Okay.   Mr. Kirby, let me hear from you.  
3     Please clarify your position with respect to the stipulated  
4     facts for this hearing.

5             MR. KIRBY:   That is correct, Your Honor, what the  
6     government has stated.   The issue that we have is whether  
7     Mr. Douglas' aunt actually signed the consent form or not.

8             THE COURT:   Okay.   So let me just confirm that the  
9     facts beginning at the bottom of page 2 of the government's  
10    response in opposition to the motion to suppress filed at ECF  
11    46 and 54 would be stipulated as true for purposes of this  
12    suppression hearing, with the exception of that singular  
13    paragraph on page 7 concerning consent?

14            MR. KIRBY:   That's correct, Your Honor.

15            THE COURT:   Okay.

16            All right.   Mr. Schiller, do you think a colloquy is  
17    necessary of the defendant himself for purposes of the  
18    stipulated facts that we're going to be operating under?

19            MR. SCHILLER:   No, I don't believe so, Judge.   I think  
20    counsel's availability to do it is fine.   Obviously, if the  
21    Court wants to, I have no objection to it, but...

22            THE COURT:   Okay.   Mr. Kirby, do you think any  
23    additional colloquy is necessary on this portion, which is just  
24    the stipulated facts I have mentioned?

25            MR. KIRBY:   No, Your Honor.   I have talked to

1 Mr. Douglas about this.

2 THE COURT: Okay. Let's swear Mr. Douglas in.

3 COURTROOM DEPUTY: Can you please raise your right  
4 hand.

5 Do you swear or affirm that the testimony you are about  
6 to give is the truth, the whole truth, and nothing but the  
7 truth, so help you God?

8 THE DEFENDANT: I do.

9 THE COURT: All right. Mr. Douglas, you have been  
10 sworn, which means that anything you say later could be used  
11 against you in a future prosecution for perjury or for making a  
12 false statement. Do you understand, sir?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Okay. Have you been listening to the  
15 conversation that I have been having with the attorneys about  
16 the stipulated facts for this hearing?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Okay. Do you have any questions about what  
19 we've discussed?

20 THE DEFENDANT: None at this time, Your Honor.

21 THE COURT: Now, I want to make sure you understand  
22 that at this evidentiary hearing you would have the obligation  
23 or the right -- excuse me -- the right to introduce any  
24 evidence you wish on any disputed questions of fact. Do you  
25 understand that, sir?

1 THE DEFENDANT: I do.

2 THE COURT: And so what I have heard the attorneys say  
3 is that for purposes of this hearing, there is an agreement  
4 that all of the facts set forth on pages 2 through 8 of the  
5 government's opposition at docket entry 60 are true, for  
6 purposes of this hearing, with the exception of the consent  
7 paragraph at the bottom of page 7.

8 Do you understand that, sir?

9 THE DEFENDANT: I do.

10 THE COURT: Okay. And are you willing to stipulate to  
11 those facts for purposes of this suppression hearing?

12 THE DEFENDANT: I guess. I haven't read what the  
13 government wrote, but...

14 THE COURT: You have not?

15 THE DEFENDANT: I have not read it yet, no.

16 THE COURT: Well, then I think it is necessary for you  
17 to be fully familiar with what it is that you are stipulating  
18 as true for purposes of this hearing. So we are going to take  
19 a 15-minute break so Mr. Kirby and Mr. Howes can present that  
20 information to Mr. Douglas, and so that he can have enough time  
21 to understand the factual portion that we have been addressing.

22 So the Court is in a brief recess.

23 (A recess was taken from 9:44 a.m. to 10:00 a.m.)

24 THE COURT: Please be seated. We are back in case  
25 number 23-80219.



1           Mr. Kirby, have you had an opportunity to consult with  
2   Mr. Douglas regarding the stipulated facts for this hearing?

3           MR. KIRBY: Your Honor, he read through the facts one  
4   more time. Yes -- so, yes, Your Honor, we have.

5           THE COURT: Okay. Let's get back to Mr. Douglas.

6           You remain under oath, sir. I want to finish up my  
7   conversation with you.

8           Have you had a full chance to review the facts that are  
9   being agreed to for purposes of this suppression hearing, sir?

10          THE DEFENDANT: Yes, Your Honor.

11          THE COURT: Okay. And do you agree that all of those  
12   facts are true for purposes of this suppression hearing, with  
13   the exception of the consent paragraph that was flagged by  
14   Mr. Schiller?

15          THE DEFENDANT: Yes, Your Honor.

16          THE COURT: Okay. Do you need any additional time to  
17   discuss these stipulated facts for purposes of this hearing  
18   with your attorney?

19          THE DEFENDANT: No, Your Honor.

20          THE COURT: Has anybody forced you to agree to those  
21   facts for purposes of this hearing?

22          THE DEFENDANT: No, Your Honor.

23          THE COURT: Are you doing so freely and voluntarily?

24          THE DEFENDANT: Yes, Your Honor.

25          THE COURT: Okay. Do you have a copy of those facts in

1 front of you, Mr. Douglas?

2 THE DEFENDANT: They have been removed, but they're  
3 over there somewhere.

4 MR. KIRBY: It's right there (indicating).

5 Yes, Your Honor. We --

6 THE DEFENDANT: Yes.

7 MR. KIRBY: Yes, he does, Your Honor.

8 THE COURT: Okay. I just want him to have a copy of  
9 that in front of him, and so that I can verify just precisely  
10 exactly what is being agreed to from a page number perspective.

11 Do you have a document in front of you, sir, with a  
12 blue banner on the top that says Document 60?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Okay. And so what's being agreed to, for  
15 purposes of this hearing -- I want to make sure you  
16 understand -- starts at the bottom of that page where it says  
17 "facts."

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: And it continues continuously through  
20 page 3, 4, 5, 6, and 7, but then once you get to the bottom of  
21 7, the paragraph that starts "with Douglas now in custody," do  
22 you see that, sir?

23 THE DEFENDANT: Just a moment.

24 MR. KIRBY: Right there (indicating).

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: So that paragraph is not being stipulated  
2 for purposes of this hearing. Do you understand that, sir?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Mr. Schiller, with respect to page 8, what,  
5 if anything, in that half-a-page portion is being agreed to for  
6 purposes of this hearing, as far as you understand things?

7 MR. SCHILLER: The first two paragraphs, Your Honor.

8 THE COURT: So the entirety of it?

9 MR. SCHILLER: Yes, ma'am.

10 THE COURT: Even the part that says "upon receiving the  
11 signed consent"?

12 MR. SCHILLER: Right. I -- yes. I don't think the  
13 defense is saying that we didn't receive it. They're just  
14 contesting another part of it. But, yes.

15 THE COURT: Okay. All right. And then those two  
16 paragraphs, Mr. Douglas, also are being agreed to for purposes  
17 of this suppression hearing. Do you understand that?

18 Now I'm referring to the top of page 8. Do you see?

19 THE DEFENDANT: Uh-huh, yes, Your Honor.

20 THE COURT: Okay. And so, to be clear, do you agree  
21 that all of these facts are being agreed to for purposes of  
22 this hearing, and that you have had enough time to think about  
23 these matters before agreeing to stipulate to these facts?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Okay. All right. Then let's proceed

1 forward.

2 Having ironed out the question of the agreed facts,  
3 Mr. Schiller, what do you propose we turn to next?

4 MR. SCHILLER: So, Judge, if we could look at docket  
5 entry -- sorry, ma'am -- docket entry 47, which is the  
6 defendant's motion to suppress statements; the government  
7 responded at docket entry 61.

8 What the parties have agreed to is, we will play the  
9 interview -- which is an audio recording, and I have it on my  
10 computer -- for the Court openly, and so the Court can listen  
11 to the parts of the interview that are relevant to the  
12 defendant's motion to suppress and the government's response.  
13 I estimate that it is probably about 15 minutes' worth of audio  
14 recording.

15 THE COURT: Is it the full interview or excerpts?

16 MR. SCHILLER: It is excerpts. It is the -- about two  
17 or three minutes from the beginning when Miranda is read and  
18 his acknowledgement of such, and then about a 10- or 15-minute  
19 section beginning at about the 35-minute mark until about the  
20 50-minute mark.

21 THE COURT: Is there a written transcript of the full  
22 interview?

23 MR. SCHILLER: We are working on it, but we were not  
24 able to get it done before today's hearing. I do have a copy  
25 for the Court on a flash drive. So if, in addition to what we

1 play in court today, the Court needs to listen to it further or  
2 again, I can certainly -- I have that ready to provide to the  
3 Court.

4 THE COURT: Okay. Mr. Kirby?

5 MR. KIRBY: The excerpts that the government intends to  
6 play covered the issue, as far as I'm concerned.

7 THE COURT: Okay. So are there any other additional  
8 portions of that interview that you believe need to be played  
9 separate from the portions that have been identified by  
10 Mr. Schiller?

11 MR. KIRBY: No, Your Honor.

12 THE COURT: Okay. And this excerpt of the interview is  
13 going to be marked as what?

14 MR. SCHILLER: We can -- we will mark this as an  
15 exhibit. We will probably have one or two exhibits before  
16 that. So I'm not sure what number it will be yet, maybe 3 or  
17 4.

18 THE COURT: Okay.

19 MR. SCHILLER: Yeah.

20 THE COURT: All right. Well, then we will number it  
21 later, but for now you can -- any objection, Mr. Kirby, to  
22 admission of Government's Exhibit -- you're going to have to  
23 give me a number now, Mr. Schiller.

24 MR. SCHILLER: Oh, I'm sorry, ma'am. All right. We  
25 will -- you know what? We will call that 1 then.

1 THE COURT: Okay. Any objection to admission of  
2 Government's 1, which is a portion of the custodial interview?

3 MR. KIRBY: Subsequent to it actually being played and  
4 listening to it, no, Your Honor.

5 THE COURT: Okay. All right. Well, we will then play  
6 the exhibit. And after that, Mr. Kirby, if you have any  
7 objection to it, please advise the Court.

8 Let's go.

9 MR. SCHILLER: You want us to start that one now,  
10 Judge?

11 THE COURT: Yes.

12 MR. SCHILLER: Okay. No problem.

13 Judge, the recording, just so the record is clear, is  
14 1 hour 56 minutes and 55 seconds long. I am going to start it  
15 at 4 minutes and 19 seconds --

16 THE COURT: Did you say 1 hour -- and what?

17 MR. SCHILLER: 1 hour 56 minutes and 55 seconds long.  
18 And I'm going to be starting it at 4 minutes and 19 seconds.

19 THE COURT: So it's a, roughly, 2-hour interview total?

20 MR. SCHILLER: That is correct, ma'am.

21 Well, I'm going to start it at 4 minutes and  
22 13 seconds.

23 THE COURT: Okay.

24 (A video and/or audio was played.)

25 MR. SCHILLER: Judge, I have stopped the recording at

1 5 minutes and 25 seconds.

2 What the Court just heard was the interview conducted  
3 by Homeland Security Investigations Special Agent Aisha Rahman  
4 with the defendant, Michael Douglas; the reading of Miranda;  
5 and what we purport to be his acknowledgement of those rights  
6 to proceeding with the interview. That was the first issue  
7 brought up by the defense in their motion to suppress.

8 For the record, at docket entry 47, page 2, the first  
9 full paragraph, the defense wrote in their motion, "Prior to  
10 questioning him, agents did advise Douglas of his Miranda  
11 rights, but at no point received an oral or written waiver from  
12 Douglas of those rights." So that's why the government played  
13 that portion.

14 THE COURT: Mr. Kirby?

15 MR. KIRBY: And that's correct, Your Honor. There is  
16 no -- there is no portion of that tape in which  
17 the -- Mr. Douglas ever waives his rights. I mean, he is -- he  
18 is read those rights, but he never waives them. That is  
19 outside of normal procedure, as far as I know. And he is never  
20 asked whether or not he waived those rights and agrees to  
21 testify -- or agrees to questioning. And that's improper.

22 THE COURT: Okay. I would like for this hearing to be  
23 evidence and then argument. So I don't know about this  
24 start-stop method, but I want to hear all the evidence and then  
25 I will give each side an opportunity to argue. But, so far,

1 it's getting jumbled. So let's reserve argument. And I would  
2 just like to hear the evidence that is Government's Exhibit 1.

3 MR. SCHILLER: Thank you, ma'am. And I apologize for  
4 that.

5 MR. KIRBY: And no -- and, Your Honor, no objection to  
6 that actually being part of the recording, Your Honor. I do  
7 agree to that.

8 THE COURT: Okay. So let me just be clear. Do you  
9 object to admission, for purposes of this hearing, Government's  
10 Exhibit 1, which is excerpts of the nearly 2-hour custodial  
11 interview conducted in this case December -- what is the date,  
12 Mr. Schiller?

13 MR. SCHILLER: December 12, 2023.

14 THE COURT: Yes or no, Mr. Kirby?

15 MR. KIRBY: I do not, Your Honor.

16 THE COURT: Okay. All right. So Government's  
17 Exhibit 1 will be admitted without objection.

18 And then is Government's Exhibit 2 the entire  
19 recording?

20 MR. SCHILLER: Government's Exhibit 1 is the entire  
21 recording.

22 THE COURT: Okay. Again, I thought there was an  
23 exhibit that had excerpts, the ones you're playing for the  
24 Court right now, and then separately there is the entire  
25 two-hour. Or are you having it all in one exhibit and just



1 marking the portions?

2 MR. SCHILLER: That's correct, Your Honor. I'm sorry.

3 And I apologize for that. I thought I was -- I thought

4 explained it, but it's -- that's my fault.

5 No, the exhibit is the entire recording, and I am

6 playing the excerpts that are relevant to the motion to

7 suppress.

8 THE COURT: Okay. Do you have an exhibit list for this

9 hearing?

10 MR. SCHILLER: No, not -- not prepared in advance,

11 ma'am, no. Because I wasn't --

12 THE COURT: Okay. Well, this is the problem.

13 We're -- it's disorganized. So we have one exhibit so far,

14 it's Government's Exhibit 1, and it's the entire custodial

15 interview.

16 MR. SCHILLER: Correct.

17 THE COURT: Okay. Now we have to go -- now go back.

18 Mr. Kirby, do you object to admission of the entire

19 custodial interview as Government's Exhibit 1?

20 MR. KIRBY: No, Your Honor.

21 THE COURT: Okay. So Government's Exhibit 1 is the

22 entire interview.

23 And you should have an exhibit list prior to the

24 hearing to avoid confusion.

25 MR. SCHILLER: Yes, ma'am.

1 THE COURT: Okay. So let's continue to play portions  
2 of Government's Exhibit 1.

3 (Government Exhibit 1 was received in evidence.)

4 MR. SCHILLER: Thank you, ma'am. We are now going to  
5 continue from Government's Exhibit 1, playing at 35 minutes and  
6 43 seconds.

7 (A video and/or audio was played.)

8 MR. SCHILLER: Your Honor, I have paused the tape at  
9 42 minutes and 17 seconds.

10 THE COURT: Okay. What is your next clip?

11 MR. SCHILLER: We are going to play from 56:35.

12 THE COURT: Okay.

13 MR. SCHILLER: Your Honor, sorry. 56:29. My  
14 apologies.

15 THE COURT: Okay. 56:29 is the start of clip 3.

16 MR. SCHILLER: Yes, and this one will go for about  
17 30 seconds.

18 (A video and/or audio was played.)

19 MR. SCHILLER: Judge, I have stopped it at 57:30.

20 THE COURT: Okay. Next clip.

21 MR. SCHILLER: That's it for purposes of presenting any  
22 information where the defendant mentioned anything regarding  
23 the motion to suppress.

24 THE COURT: Okay. So, to be clear, we have three  
25 clips.

1           Mr. Kirby, do you have any additional clips from  
2   Government's Exhibit 1 that you wish to play? Mr. Kirby.

3           MR. KIRBY: I'm thinking, Your Honor. I'm sorry. I  
4   am -- I am here, Your Honor.

5           No. I think -- I think that covers it, Your Honor.

6           THE COURT: Okay. All right. Any additional exhibits  
7   or testimony to present on the various motions set for today's  
8   hearing?

9           MR. SCHILLER: Yes, ma'am. The government has a  
10   witness to call regarding the consent.

11          THE COURT: Okay. Call your first witness, please.

12          MR. SCHILLER: Thank you. The government calls  
13   Homeland Security Investigations Special Agent Bonnie Myers.

14          THE COURT: Good morning, Agent. Please make your way  
15   to the witness stand to be sworn in.

16          COURTROOM DEPUTY: Do you swear or affirm that the  
17   testimony you are about to give is the truth, the whole truth,  
18   and nothing but the truth, so help you God?

19          THE WITNESS: I do.

20          THE COURT: Thank you. Please be seated and tell us  
21   your full name.

22          THE WITNESS: Bonnie Lynn Myers.

23          MR. SCHILLER: May I proceed, Your Honor?

24          THE COURT: Yes.

25          MR. SCHILLER: Thank you.

1           Could I approach the podium?

2           THE COURT:   Yes.

3           MR. SCHILLER:   Thank you.

4   Thereupon:

5       HOMELAND SECURITY INVESTIGATIONS SPECIAL AGENT BONNIE MYERS

6   having been sworn by the Courtroom Deputy, testified as

7   follows:

8                               DIRECT EXAMINATION

9   BY MR. SCHILLER:

10   Q.   Good morning, Agent Myers.

11   A.   Good morning.

12   Q.   How long have you been employed with Homeland Security

13   Investigations?

14   A.   I have been with Homeland Security Investigations since

15   2010.

16   Q.   And prior to 2010, did you serve in any other law

17   enforcement capacity?

18   A.   Yes.   I was with the United States Border Patrol from 2003

19   to 2010.

20   Q.   Okay.   Prior to that, any other law enforcement?

21   A.   No.

22   Q.   So have you been in law enforcement consecutively for

23   21 years?

24   A.   That's correct.

25   Q.   During that time, have you testified in any number of

1 proceedings, whether in state or federal court?

2 A. Yes, I have.

3 Q. Have you presented search warrants, affidavits for  
4 complaint and arrest to federal magistrate judges during that  
5 time period?

6 A. Yes, I have.

7 Q. And in all times that you have testified, has your  
8 testimony been impugned for dishonesty, lack of truth, lack of  
9 candor?

10 A. No.

11 Q. I want to direct your attention, if I could, to  
12 December 12, 2023. Were you involved as part of the team that  
13 was going to eventually be part of the arrest or search of the  
14 defendant's residence belonging to Michael Douglas?

15 A. Yes, I was.

16 Q. Okay. And what was your responsibility on the 12th as it  
17 eventually became?

18 A. I was assigned with a team that was going to be part of the  
19 search warrant at the residence.

20 Q. And was there a search warrant in place for the residence  
21 where Michael Douglas had lived in the Southern District of  
22 California?

23 A. Yes, there was.

24 Q. Was that at 525 West El Norte Parkway, Space 75, in  
25 Escondido, California?

1 A. That's correct.

2 Q. And did a federal magistrate judge in the Southern District  
3 of California sign a search warrant for that residence?

4 A. Yes.

5 Q. At approximately 9:00 p.m. on December 12, 2023, were you  
6 made aware that the defendant had been arrested?

7 A. Yes, I was.

8 Q. And following that arrest, is it at that point that you and  
9 other agents executed the search warrant at the residence?

10 A. That's correct.

11 Q. Approximately how many agents were there?

12 A. I can't remember offhand. Maybe ten agents.

13 Q. Okay. And how was it that the search warrant was executed?  
14 Knocking and announcing?

15 A. Yes. There was a knock-and-announce --

16 Q. Okay.

17 A. -- entry at the residence.

18 Q. And upon entry into the residence, how many individuals  
19 were found in the residence?

20 A. There were approximately three individuals encountered at  
21 the residence.

22 Q. And who were they?

23 A. I believe Adrianne Corirossi is the name.

24 Q. Sorry. Is that a male?

25 A. It's a male. Sorry. A male individual. And two females.

1 Q. And who were the two females?

2 A. Linda Douglas and Patricia Douglas.

3 Q. Did you learn that Linda Douglas was the mother of the  
4 defendant, Patricia Douglas was the aunt of the defendant?

5 A. Yes.

6 Q. Did you alone interact with those two individuals?

7 A. No, I was not alone.

8 Q. Who else interacted with you?

9 A. There was another agent with me by the name of Special  
10 Agent Cesar Valdivia, as well as the other agents completing  
11 the search were in the room as well.

12 Q. But who interacted with Ms. Linda Douglas and Ms. Patricia  
13 Douglas?

14 A. That was myself and Agent Valdivia.

15 Q. Can you tell the Court how your, just, interactions were  
16 with them. Not what was said yet, but how was the pleasantries  
17 or lack thereof between you and the two Douglas women?

18 A. It was very cordial. They were very open to speaking with  
19 us.

20 Q. Who did most of the talking while you were talking with  
21 Ms. Linda Douglas and Ms. Patricia Douglas?

22 A. I believe Linda Douglas did most of the talking.

23 Q. The mother?

24 A. The mother, yes.

25 Q. Okay. Did you talk to the two of them together?

1 A. Yes.

2 Q. Did you record your conversation with them, either audio or  
3 video?

4 A. It was not recorded at the time.

5 Q. How long did you talk to the two of them?

6 A. I can't remember offhand. Maybe approximately 20 minutes.

7 Q. Okay.

8 A. 20, 30 minutes.

9 Q. And what was the general point -- or what was the general  
10 conversation that you had with the two of them?

11 A. The conversations were more just general information about  
12 the defendant, his whereabouts, and who lived at the residence,  
13 more establishing who came -- came and went from the residence.

14 Q. In talking with Linda Douglas, the mother, did you notice  
15 any infirmaries [sic], anything that would suggest to you that  
16 she didn't understand the conversations you were having with  
17 her, whether it was a physical or mental disability -- the  
18 mother, that is?

19 A. No, I did not.

20 Q. Same question for the aunt, Patricia Douglas. Did you  
21 notice whether or not there were any infirmaries, whether it  
22 was mental or physical, such that she wasn't understanding the  
23 conversation you were having with her?

24 A. No, I did not.

25 Q. When you spoke to Patricia Douglas specifically, the aunt,



1 was she responsive to your questions?

2 A. Yes, she was.

3 Q. And in talking with Patricia Douglas specifically, did you  
4 or the other agent ever raise your voice with her?

5 A. No.

6 Q. Ever pull your weapon on her?

7 A. No.

8 Q. Ever stand over her and in a towering manner?

9 A. No, we did not.

10 Q. Were you sitting or standing during most of your  
11 conversation with her?

12 A. We were sitting during most of the conversation.

13 Q. And at some point during your interactions with her, did  
14 you talk to Patricia Douglas about a specific Toyota Highlander  
15 vehicle?

16 A. Yes, I did.

17 Q. And what were you talking to her about when it came to the  
18 vehicle?

19 A. I -- I had asked her -- they knew that the defendant had  
20 the vehicle and was out with the vehicle, and that we wanted to  
21 search the vehicle.

22 Q. Did Patricia Douglas affirm that that vehicle belonged to  
23 her and she was the owner of it?

24 A. Yes, she did.

25 Q. Okay. And, in fact, that's true; she is actually the owner

1 of that vehicle?

2 A. Yes, she is.

3 Q. Okay. And did you ask Ms. Douglas for consent for the  
4 agents to search that vehicle?

5 A. Yes, I did.

6 Q. And did she have any questions about that?

7 A. No, she did not have any questions.

8 Q. Did you physically ask her for consent then to search the  
9 vehicle?

10 A. Yes, I did.

11 Q. Did she grant you that consent?

12 A. She did grant consent.

13 Q. Did you do anything more to confirm the consent?

14 A. I asked her to sign a written consent form as well.

15 Q. Thank you.

16 MR. SCHILLER: Just a moment, Your Honor.

17 MR. KIRBY: Is this an exhibit?

18 MR. SCHILLER: Yes.

19 MR. KIRBY: Okay.

20 MR. SCHILLER: I'm just showing it to you. You have  
21 it.

22 Your Honor, I would like to mark the consent to search  
23 as Government's Exhibit 1 for identification purposes.

24 THE COURT: Okay.

25 ///

1 (Government Exhibit 1 was marked for identification.)

2 MR. SCHILLER: Thank you. If I could approach the  
3 witness.

4 THE COURT: Yes.

5 MR. SCHILLER: Thank you.

6 BY MR. SCHILLER:

7 Q. Agent Myers, is that the consent form that you had  
8 completed with Ms. Patricia Douglas?

9 A. Yes, it is.

10 Q. Okay. And what is the tenor of that consent form?

11 A. The consent form -- it's my handwriting at the top --  
12 explains Patricia Douglas was informed by me of her right to  
13 consent to search the property. And I list the -- the vehicle  
14 and the license plate.

15 Q. And who filled out the form where it says the name of the  
16 vehicle and the license plate number?

17 A. I filled that out.

18 Q. Okay. At the very bottom of that form there are three  
19 signatures, are there not?

20 A. There is.

21 Q. Okay. And with the signatures are dates and  
22 handwritten -- handwritings, printings of the name?

23 A. Yes.

24 Q. Who is the very last line of the signature with the printed  
25 name, signature, and date?

- 1 A. The very last line?
- 2 Q. Yes, ma'am.
- 3 A. Special Agent Cesar Valdivia.
- 4 Q. And he was the one who was with you?
- 5 A. Yes.
- 6 Q. And it's his printed name and his signature?
- 7 A. That's correct.
- 8 Q. And what is the date?
- 9 A. December 12, 2003.
- 10 Q. Right above that, whose signature is there?
- 11 A. That's my signature.
- 12 Q. And your printed name?
- 13 A. My printed name and signed name.
- 14 Q. And you wrote that?
- 15 A. Yes, I did.
- 16 Q. And what information is right above your signature line?
- 17 A. That is Patricia Douglas.
- 18 Q. And is it her signature?
- 19 A. Yes, it is.
- 20 Q. And the date 12/12/23?
- 21 A. That's correct.
- 22 Q. Did you witness her sign that?
- 23 A. Yes, I did.
- 24 Q. Did you witness her print her name and sign her name?
- 25 A. Yes.

1 Q. And in printing her name and signing her name, did she ask  
2 you any questions about the form?

3 A. No.

4 Q. And you witnessed her physically do it?

5 A. Yes, I did.

6 MR. SCHILLER: Your Honor, at this time I would like to  
7 move this into evidence as Government's Exhibit 2.

8 THE COURT: Any objection?

9 MR. KIRBY: No.

10 THE COURT: All right. Government's Exhibit 2 is  
11 admitted without objection.

12 (Government Exhibit 2 was received in evidence.)

13 BY MR. SCHILLER:

14 Q. Following the obtaining of the verbal and written consent  
15 to search the Toyota Highlander, did Ms. Douglas present you  
16 with any questions?

17 A. No, she did not.

18 Q. Did she ever withdraw her consent?

19 A. No, she did not.

20 Q. And was that form sent over to the agents on scene with the  
21 Toyota Highlander so that they could have it?

22 A. Yes, it was.

23 MR. SCHILLER: No further questions, Your Honor. Thank  
24 you.

25 THE COURT: I have a question.

1           Where were you when you were having this conversation  
2   with the two Douglas women?

3           THE WITNESS: We were in the living room area of the  
4   residence.

5           THE COURT: Were you sitting on a couch or any other  
6   furniture?

7           THE WITNESS: I believe I was sitting -- there was two  
8   chairs, and Patricia and Linda Douglas were both seated on the  
9   couch.

10          THE COURT: And overall, how long do you estimate your  
11   entire interaction lasted with the Douglas women?

12          THE WITNESS: I -- I believe possibly 20 to 30 minutes,  
13   talking with them.

14          THE COURT: And when you explained -- excuse me -- you  
15   testified earlier that Ms. Patricia Douglas consented to the  
16   search of the vehicle orally and then later in writing, can  
17   you, in just your own words, describe to us the conversation  
18   that you had with Ms. Patricia Douglas about the consent.

19          THE WITNESS: Sure. So I will try -- the vehicle --  
20   they were both very concerned about the vehicle. That was  
21   their only working vehicle at the time, if I remember in the  
22   conversation.

23                I explained to them where it was and that we would like  
24   to search the vehicle. And I asked Patricia specifically if  
25   she was the registered owner; she said yes, she was. And I

1 asked if she would grant us consent to search the vehicle, and  
2 she said yes.

3 So at that time I filled out the form in front of her,  
4 asked her if it was correct; she said yes. And asked her, in  
5 the line here, if she voluntarily granted us consent to search  
6 it; she said yes and signed the form. I then proceeded to sign  
7 it and then Special Agent Cesar Valdivia signed it below me.

8 THE COURT: Did Ms. Patricia Douglas ever express any  
9 hesitation in the verbal or written consent?

10 THE WITNESS: No, she did not.

11 THE COURT: Did she ask any questions seeking to  
12 clarify anything on the written form?

13 THE WITNESS: She did not.

14 THE COURT: Okay. Thank you.

15 Cross-examination.

16 MR. SCHILLER: Thank you, ma'am.

17 MR. KIRBY: May I approach the podium, Your Honor?

18 THE COURT: Yes, sir.

19 MR. KIRBY: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. KIRBY:

22 Q. Good morning, Special Agent Myers.

23 A. Good morning.

24 Q. So you testified that you met with both Linda and Patricia  
25 Douglas the day Mr. Douglas was arrested; is that correct?

1 A. That's correct.

2 Q. And when you were speaking with -- well, first of all, you  
3 stated, did you not, that Linda Douglas did most of the  
4 speaking?

5 A. Yes.

6 Q. And did Ms. Patricia Douglas seem subdued while you were  
7 speaking with them?

8 A. Subdued? What do you mean, sir?

9 Q. Not speaking very much?

10 A. She did speak. I wouldn't -- I wouldn't say she was  
11 subdued.

12 Q. But she didn't speak very much?

13 A. Linda Douglas did do most of the talking.

14 Q. And did she seem alert?

15 A. Yes.

16 Q. Were you aware that she had been diagnosed with a stroke?

17 THE COURT: When you say "she," who are you referring  
18 to?

19 MR. KIRBY: My apologies, Your Honor.

20 BY MR. KIRBY:

21 Q. Were you aware that Patricia Douglas had been diagnosed  
22 with a stroke?

23 A. I was not.

24 Q. Did it appear to you that she had been?

25 A. No, it did not.



1 Q. Did you take any steps to ascertain Patricia Douglas' state  
2 of mind prior to having her execute this -- this waiver?

3 A. What steps would you mean, sir?

4 Q. Did you take any steps to see whether she was coherent,  
5 whether she understood what was going on?

6 A. I believe the conversation, when she was speaking openly to  
7 me, that I understood that she was coherent and understanding  
8 the conversation.

9 Q. And I believe you stated, did you not, that this  
10 conversation between you, Ms. Linda Douglas, and Ms. Patricia  
11 Douglas took place in the living room of Linda Douglas'  
12 residence; is that correct?

13 A. That's correct.

14 Q. And where exactly were you seated or -- I believe you said  
15 you were seated. Is that correct?

16 A. Yes.

17 Q. And where exactly were you seated?

18 A. Directly across from them. They were seated on the couch.

19 Q. And at this point -- well, how long into the conversation  
20 did you ask that Patricia Douglas sign the waiver form?

21 A. I -- I don't remember exactly. It may have been  
22 15 minutes -- 10, 15 minutes into the conversation.

23 Q. Now, my understanding, and correct me if I'm wrong, is that  
24 there is no table in that living room area. Is that correct?

25 A. I do not remember at this time.

1 Q. Well, if there was no table, how did Patricia Douglas sign  
2 the form?

3 MR. SCHILLER: Objection. Calls for speculation.

4 THE COURT: Overruled.

5 THE WITNESS: I -- I don't remember offhand if it was  
6 at a table or if she was brought a notebook to put the paper on  
7 when she signed it. But she signed it there in the living  
8 room.

9 BY MR. KIRBY:

10 Q. And are you absolutely certain that Patricia Douglas did,  
11 in fact, sign this form?

12 A. Yes, I am.

13 Q. And no effort was ever made to find an example of her  
14 signature elsewhere?

15 A. At that time, no, I did not make any effort.

16 Q. So the signature on that form, your testimony today, you  
17 witnessed her sign that form?

18 A. That's correct.

19 MR. KIRBY: Thank you, Your Honor.

20 THE COURT: Redirect?

21 MR. SCHILLER: No, Your Honor. Thank you.

22 THE COURT: Thank you, Agent. How do you spell your  
23 last name?

24 THE WITNESS: Myers, M-Y-E-R-S.

25 THE COURT: And first name again.

1 THE WITNESS: Bonnie, B-O-N-N-I-E.

2 THE COURT: And, just to be clear, it's Special Agent  
3 with the Department of Homeland Security?

4 THE WITNESS: That's correct.

5 THE COURT: Okay. Are you in a particular unit?

6 THE WITNESS: I am currently acting over a contraband  
7 smuggling unit. And prior to that, and at the time of the  
8 search warrant, I was in the child exploitation unit.

9 THE COURT: Okay. Thank you, ma'am.

10 Anything further from either side for the witness?

11 MR. SCHILLER: Not from the government.

12 MR. KIRBY: No, Your Honor.

13 THE COURT: Okay. Thank you. You may be excused.

14 Okay. Any additional evidence, either in the form of  
15 witness testimony or exhibits to present, Mr. Schiller?

16 MR. SCHILLER: One piece of exhibit that we would  
17 like -- one exhibit we would like to admit, Judge, and that is  
18 the certified passport application of Ms. Patricia Douglas. We  
19 mentioned it in our response to the motion to suppress. And on  
20 Friday we received the official certified, sealed copy that I  
21 would like to move in evidence.

22 But before I do, it obviously contains a lot of  
23 personal information of Ms. Douglas. So although I will submit  
24 the original to the Court, I would like permission to redact  
25 that personal information, her date of birth, social security

1 number, and things like that before I file it into the record.

2 THE COURT: Okay. Any objection to admission of  
3 Government's Exhibit 3, which is a certified copy of  
4 Ms. Patricia Douglas' passport application?

5 MR. KIRBY: Your Honor, only with the caveat that I  
6 would like to see the redaction before it is actually entered  
7 into evidence.

8 THE COURT: Okay. Well, the full document, without  
9 redactions, will be admitted and will be filed under seal; the  
10 parties can work together on what redactions of personal  
11 identifying information.

12 But do you have any objection to the document and its  
13 full contents being introduced for purposes of this hearing?

14 MR. KIRBY: As long as it's filed under seal,  
15 Your Honor, I do not.

16 THE COURT: Okay. All right. Now, of course, there  
17 needs to be a motion to redact only that which is necessary  
18 under the CM/ECF electronic filing rules for PII. If there is  
19 any other contents, you would need to justify why it needs to  
20 be sealed.

21 MR. SCHILLER: Understood, Your Honor. Does Your Honor  
22 need me to file a motion to that effect after today's hearing?

23 THE COURT: Yes.

24 MR. SCHILLER: I will do so. Thank you.

25 THE COURT: Okay. I will, nevertheless, take a look at

1 that exhibit.

2 MR. SCHILLER: May I approach now, Your Honor?

3 THE COURT: Yes.

4 MR. SCHILLER: Thank you very much. And I'm  
5 approaching with Government's Exhibit 2, the consent form, and  
6 3, which is the passport application.

7 THE COURT: Okay.

8 MR. KIRBY: And, Your Honor, I have received a copy of  
9 those.

10 THE COURT: Okay.

11 (Government Exhibit 3 was received in evidence.)

12 MR. SCHILLER: And, Your Honor, so the record is clear,  
13 those are both the original piece of evidence; that is the  
14 original signed consent form and that is the original passport  
15 certification that we received. Those are not copies.

16 THE COURT: Okay. I'm going to return these originals  
17 to you, Mr. Schiller.

18 MR. SCHILLER: Thank you, ma'am. If I may approach.

19 THE COURT: Yes.

20 Okay. Any additional evidence to present at this  
21 hearing, Mr. Schiller?

22 MR. SCHILLER: Not regarding the motions to suppress,  
23 Your Honor.

24 THE COURT: Okay. Mr. Kirby, you have an opportunity  
25 to present any evidence you would like on the motions to

1 suppress. Do you have any evidence to bring to the table at  
2 this time?

3 MR. KIRBY: Your Honor, only with the caveat that is in  
4 Your Honor's written order concerning reopening with  
5 the -- with possible evidence related to the handwriting  
6 expert, I do not, Your Honor.

7 THE COURT: Okay. So there is a deadline.  
8 Ms. Cassisi, can you remind the Court. Is it September 2nd by  
9 which any motion to reopen the hearing would need to be filed?

10 COURTROOM DEPUTY: Yes, Your Honor.

11 THE COURT: Okay. So, Mr. Kirby, you are correct. You  
12 have until September 2nd to file a motion to reopen for the  
13 limited purpose of introducing any exemplars with respect to  
14 the handwriting of Ms. Patricia Douglas as it relates to your  
15 challenge on the consent form. Is that correct?

16 MR. KIRBY: Your Honor --

17 THE COURT: Exemplars and then the expert testimony,  
18 having compared those exemplars and come up with any opinion  
19 that the expert has on the signature.

20 MR. KIRBY: Perfect, Your Honor, yes.

21 THE COURT: Okay.

22 MR. KIRBY: Thank you.

23 THE COURT: I should also note that if you are going to  
24 rely on an expert, you need to comply with the disclosure  
25 rules, Mr. Kirby. And so if you are going to notice an expert,

1 you need to go through the process of noticing the expert by  
2 filing a proper notice and then, of course, supplying the  
3 report to the government on a timely basis in accordance with  
4 the federal rules. Do you understand that, sir?

5 MR. KIRBY: I do, Your Honor. Thank you.

6 THE COURT: Okay. All right. So, just to be clear,  
7 Mr. Kirby, at this time you do not have any evidence to present  
8 on the motions; is that correct?

9 MR. KIRBY: No additional, yes, Your Honor.

10 THE COURT: Okay. All right. Well, then let me hear  
11 argument on the motion to suppress, starting first with the  
12 search of the vehicle.

13 MR. SCHILLER: Thank you, Your Honor. If I may  
14 approach.

15 THE COURT: Yes.

16 MR. SCHILLER: Thank you.

17 Thank you, Your Honor.

18 With regards to the motion to suppress the vehicle, the  
19 government is objecting because there were at least five legal  
20 avenues for law enforcement to have searched the Toyota  
21 Highlander that the defendant was arrested in on December 12th,  
22 2003; four of those are exceptions to the warrant requirement  
23 related to probable cause, and one of those is related to  
24 consent. So I will start with the last first because it  
25 appears to be the clearest.

1           The agent who just testified, Homeland Security  
2   Investigations Special Agent Myers, testified that after  
3   9:00 p.m., which is actually right after the defendant was  
4   arrested, they executed the search warrant at the defendant's  
5   residence. She and her partner sat down in the living room  
6   with the defendant's mother and aunt and spoke to them. They  
7   had a cordial conversation. There was no threats made to them.  
8   They were not coerced in any way. And during the course of the  
9   conversation, asked the aunt if she was the owner of the  
10   vehicle; she said yes. And asked her to provide consent to  
11   search the vehicle; she said yes and then signed the consent  
12   form. And Agent Myers testified that she witnessed that and  
13   witnessed her signature.

14           Now, in an effort to combat the defendant's argument  
15   that either it was never done or she never signed it, or -- I'm  
16   not exactly sure what they're saying didn't happen, but we  
17   presented that consent to search in evidence as Government's  
18   Exhibit 2 for the Court.

19           And then after the motion was filed, suggesting that it  
20   was not her signature for some reason, without any evidence to  
21   the contrary except for an affidavit that's not in evidence,  
22   the government went and secured Ms. Patricia Douglas' passport  
23   application from 2021, approximately two years before she  
24   signed that consent. And Your Honor can, with a layman's eye,  
25   look at those two signatures and note that they are almost



1 identical.

2           So either that absolutely is her signature or someone  
3 forged her signature in front of agents pretending to be her  
4 and on her passport application two years ago. It's a far  
5 fetch. It's laughable. And so we would submit that there was  
6 obviously consent to search the vehicle because the aunt did  
7 sign it. That's ground 5, I guess.

8           But in addition, the government has submitted, in its  
9 response to the motion to suppress at docket entry 60, four  
10 other ways in which the vehicle could have been lawfully  
11 searched. I will just go through those one at a time. I'm not  
12 going to reread my response, but I'm just going to highlight  
13 some portions in there.

14           First, the government argues that the search incident  
15 to arrest of the vehicle was an exception to the warrant  
16 requirement. As the Court has already taken notice of what the  
17 facts are leading up to the vehicle search and what happened as  
18 outlined in Government's Exhibit 60, pages 2 through 9 -- or 2  
19 through 8, excuse me, this was a very volatile situation. The  
20 defendant had been followed from his residence by law  
21 enforcement. He had stopped and started at hotels. Onto the  
22 highway, off the highway, high speed, and violated multiple  
23 traffic violations. And when he was eventually stopped and  
24 pinned into a location on the roadway after the female  
25 passenger fell out screaming in regards to "he is going to kill

1 us all" and the word "grenade," the defendant holds up what  
2 appears to be a real grenade in his hand, causing law  
3 enforcement to have to take evasive measures and essentially  
4 set up a sniper situation. Because if he were to put his  
5 second hand up to the grenade and pull a pin, or drop it, or  
6 look like he was going to drop it, it would explode. And there  
7 were civilians in that area. There was law enforcement in that  
8 area.

9 I will submit to the Court, as I did at the appeal on  
10 the bond hearing, the defendant came within seconds of losing  
11 his life because of the actions that he took. But the agents  
12 on scene were able to get him to put the device down and have  
13 it not explode, and remove him from the car.

14 So search, incident to arrest, because he was being  
15 arrested for his actions of what he was doing, but also because  
16 there was an arrest warrant for him out of the Southern  
17 District of Florida --

18 THE COURT: Is the arrest warrant contained within the  
19 stipulated facts?

20 MR. SCHILLER: I believe it is, ma'am, yes. So at  
21 docket entry 60, page 2, the very bottom, the facts are, as  
22 stipulated, "The detailed facts of this case, through and  
23 including November 7, 2003, are contained within the criminal  
24 complaint at 23-mj-8589-RMM. That complaint included an arrest  
25 warrant."

1           And that is for the Court to take judicial notice of as  
2   it is in the official court record. But I believe it is  
3   mentioned later on that they had an arrest warrant for him;  
4   irregardless they did.

5           So --

6           THE COURT: I want to make sure we're staying -- there  
7   was -- there was -- I'm operating off of pages 2 through 8.

8           MR. SCHILLER: Yes, ma'am.

9           THE COURT: So I'm only going to be looking at those  
10   facts. If any facts that you're talking about right now are  
11   not within those 8 pages, I'm not going to consider them on the  
12   motion. So that's why I'm asking. For the arrest warrant,  
13   where is the arrest warrant referenced in this summary?

14          MR. SCHILLER: If the Court will give me just one  
15   moment.

16          Page 3, first full paragraph where it reads, "However,  
17   between November 27th and December 4th, when the complaint was  
18   signed for the defendant's arrest for seven counts of  
19   distribution of child pornography..." -- and then it goes on to  
20   talk about other things. But that is referencing the arrest.

21          THE COURT: Okay. So there was an authorized arrest.

22          MR. SCHILLER: Yes, ma'am.

23          THE COURT: Okay.

24          MR. SCHILLER: Yes. That was signed by Judge McCabe.

25          THE COURT: Okay. Again, I don't know who signed it.

1 All I know is that there was a complaint signing for the  
2 defendant's arrest.

3 So please continue.

4 MR. SCHILLER: Thank you, ma'am.

5 And just so the record is clear, on the bottom of  
6 page 2, where it lists the case number 23-mj-8589-RMM, that  
7 is -- that is Judge McCabe's arrest warrant in this case.

8 So they were searching incident to arrest because they  
9 could arrest him and they did arrest him, not only for  
10 dangerous weapons, but also to prevent the destruction of  
11 evidence. And as I noted in my response, "the purpose for a  
12 search incident to arrest is to find weapons that the suspect  
13 may use to injure police officers and to prevent the  
14 concealment or destruction of evidence of a crime." And that's  
15 citing *Michigan v. Long*, 463 U.S. 1032, a Supreme Court case  
16 from 1983. So that's exactly what the officers were doing  
17 here.

18 Now, it doesn't matter that the scene had been secured  
19 once they searched it, because they were still searching to  
20 make sure that there were no other dangerous weapons and that  
21 there wasn't any evidence that could be destroyed.

22 THE COURT: Does a search incident to arrest get you  
23 into the trunk of the vehicle?

24 MR. SCHILLER: Yes. Absolutely, ma'am.

25 THE COURT: Under *Belton*?

1 MR. SCHILLER: Yes.

2 THE COURT: That covers the passenger compartment --

3 MR. SCHILLER: Yes.

4 THE COURT: -- not the trunk.

5 MR. SCHILLER: So, the Toyota Highlander doesn't have a  
6 separate trunk compartment.

7 THE COURT: Where is that in the stipulated facts?

8 MR. SCHILLER: If the Court could give me a minute.

9 THE COURT: Sure.

10 MR. SCHILLER: I don't know that I specifically said it  
11 was one giant compartment.

12 It does not say that in the fact section.

13 THE COURT: So, for purposes of the search incident to  
14 arrest, would you agree that, at least as far as the stipulated  
15 facts are concerned, there would be no authorization to get  
16 into the trunk under that exception only?

17 MR. SCHILLER: I disagree because we did specifically  
18 say it was a Toyota Highlander, and the Highlander only has a  
19 single compartment. That is a --

20 THE COURT: Okay. Well, now you're going beyond the  
21 stipulated facts. I'm not a car expert and cannot say with  
22 certainty that a Highlander is as you describe it. So unless  
23 you want to present evidence about the Highlander to describe  
24 that it's one continuous opening without a trunk, then I'm  
25 going to stick with what's in the stipulated facts which

1 references "trunk," and the ordinary understanding of "trunk"  
2 is that it is a separate portion of the car not included in the  
3 passenger compartment. Of course, none of this is to say that  
4 there are a number of other bases on which the search  
5 potentially could be upheld. I just want to make a note for  
6 incident to arrest purposes only.

7 MR. SCHILLER: Thank you.

8 And would the Court permit me to move into evidence a  
9 photograph showing that exact fact?

10 THE COURT: Any objection, Mr. Kirby?

11 MR. KIRBY: I suppose I would have to see the  
12 photograph.

13 I don't object to the photograph, but I don't believe  
14 it shows what Mr. Schiller says it shows.

15 Same statement.

16 MR. SCHILLER: Your Honor, I would like to move in  
17 Government's Exhibit 4A and 4B. These are photographs of the  
18 vehicle in question.

19 THE COURT: Okay. Any objection to admission of  
20 photographs 4A and 4B, Mr. Kirby?

21 MR. KIRBY: Well, Your Honor, actually -- I mean, I  
22 would like some sort of foundation laid. I may have seen those  
23 in discovery; I certainly haven't seen them today.

24 THE COURT: Okay. I'm going to sustain the objection.

25 If you want to lay a foundation, Mr. Schiller, you can,

1 but at this point I think we are a bit unmoored from the  
2 evidentiary presentation.

3 MR. SCHILLER: Okay. Judge, it's fine. I will move on  
4 to the other areas because I think it's covered, certainly, in  
5 the other areas as well.

6 THE COURT: Okay. So I think you've -- anything more  
7 on search incident to arrest?

8 MR. SCHILLER: I would just cite to *Thorton v. The*  
9 *United States* at 541 U.S. 615, Supreme Court from 2004, in  
10 which the Court said, "So long as an arrestee is the sort of  
11 'recent occupant' of a vehicle such as petitioner was here,  
12 officers may search the vehicle incident to arrest."

13 THE COURT: Okay. You would agree, though, that the  
14 search incident to arrest exception in the vehicle context gets  
15 you only into the passenger compartment, not the trunk;  
16 correct?

17 MR. SCHILLER: That is correct. With the caveat that  
18 in this case, again, I know Your Honor is not a car expert, and  
19 I appreciate that, but the Toyota Highlander only is one --

20 THE COURT: There is no evidence to support the latter  
21 statement.

22 MR. SCHILLER: Okay. Thank you, ma'am.

23 The second ground in which search of the vehicle was  
24 permissible without a search warrant is the automobile  
25 exception. And I detail that response on pages 10, 11, 12, and

1 13 of my response at docket entry 60. The automobile exception  
2 applies if the vehicle is readily mobile and the vehicle is  
3 reasonably believed to contain evidence of the crime. So we  
4 need both of those, and that is because the vehicle had just  
5 been driven by the defendant. But secondly, as contained  
6 within the facts, he had been communicating with the officer in  
7 the days leading up to his arrest and of his arrest that items  
8 of the crime would actually be with him when he was coming to  
9 see the child. So both elements of that are met.

10 THE COURT: Can you point to me, in the stipulated  
11 facts, your best evidence on that point; in other words, that  
12 he was communicating with the undercover and referencing things  
13 that he would have in the car.

14 MR. SCHILLER: Sure, Judge.

15 On page 4 of my response, on December 10th -- so this  
16 is two days before the arrest -- he says, quote, "my phone is  
17 all messed up. But this is red. I think child 1 would look  
18 sexy in it, along with a photo which showed a two-piece red  
19 lingerie set that was laid out on what appeared to be a brown  
20 couch, and a set of white or clear anal beads laying on top of  
21 the lingerie set. About 10 minutes later Douglas sent the  
22 undercover agent a 33-second long video of himself nude and  
23 masturbating over a two-piece black lingerie set that was laid  
24 out on what appeared to be the same brown couch." And then --  
25 so that's part of the evidence.



1           The next day -- I'm sorry. The next paragraph, same  
2   afternoon, the undercover identified several gifts for Douglas  
3   to bring the notional child, the 8-year-old in this case, in an  
4   effort to identify the defendant if they met to confirm his  
5   intent. When the UCA, the undercover agent, mentioned a  
6   stuffed animal, Douglas replied "already done" and added that  
7   he had bought the child a stuffed unicorn.

8           And then -- on the top of page 5, on December 12th, the  
9   day of the arrest, Douglas messaged that he had a mini bullet  
10  vibrator and described he was going to use a double-headed  
11  dildo on the child. And then when the UCA reminded Douglas not  
12  to forget to bring the red lingerie and stuffed unicorn,  
13  Douglas stated that he would not forget. Of course, at the  
14  time of his arrest he was purportedly on his way to go and meet  
15  the undercover agent and the child.

16           THE COURT: Okay.

17           MR. SCHILLER: So based on that, also within the  
18  stipulated facts, the defendant noted that his phone had  
19  broken. And I know we can't look backwards in time, but search  
20  incident of the vehicle found the broken phone on the  
21  floorboard by his seats.

22           So with those facts, there is two cases I want to bring  
23  to the Court's attention. Again, all of this is in my  
24  response, but at docket entry 60, page 12, I cited to  
25  *United States v. Alexander*, 835 F.3d 1406, an Eleventh Circuit

1 opinion from 1988 where the Court found that "probable cause to  
2 search car for evidence of defendant's commission of a bank  
3 robbery, even though the bank robber fled the scene of the  
4 robbery on foot, and police had no specific evidence tying the  
5 car to the commission of the robbery, where there was abundant  
6 probable cause that the defendant had committed the robbery,  
7 the defendant had been driving the car on days after and other  
8 than the day of the robbery, and the police were simply hoping  
9 to find additional evidence of the crime that had not yet been  
10 found." That was enough for the automobile exception.

11 And I also cited to *United States v. Brazel*,  
12 B-R-A-Z-E-L, 102 F.3d 1120, an Eleventh Circuit opinion from  
13 1997, holding that there was "probable cause to search the car  
14 owned by the aunt of the co-defendant for evidence of drug  
15 offenses, even though police had never observed drugs or a gun  
16 in the car and had no specific evidence that the car was ever  
17 used to transport drugs. Where there was evidence that the  
18 defendant was involved in drug offenses, one officer had seen  
19 the defendant driving that car on a single occasion earlier  
20 that month and the officers saw razor blades through the window  
21 of the car. There was reason to believe that the defendant was  
22 the real or main user of the car since the nominal owner of the  
23 car did not have sufficient money to buy it and the car was  
24 previously spotted, though not implicated in criminal activity,  
25 at a particular surveillance site."

1           Both of those cases present significantly less probable  
2     cause for the automobile exception than we have in our case  
3     because not only was the car operational, but, as you heard the  
4     agent testify to, Patricia wanted to get her car back because  
5     it was her vehicle. And there was probable cause to believe  
6     that the vehicle contained not only his phone but the items  
7     Douglas would bring to the sexual encounter with the  
8     8-year-old.

9           The third basis for the exception to the warrant  
10    requirement is contained in my response at docket entry 60,  
11    pages 13, 14, and 15. And this is based on exigency. And the  
12    exigency was for weapons and other explosives. So if the  
13    agents can search the car for that, anything else they find in  
14    the course of that would be a proper seizure as well.

15          And I wanted to cite the Court to  
16    *United States v. Parrado*, P-A-R-R-A-D-O, an Eleventh Circuit  
17    opinion from 1990 cited at 911 F.2d 1567, where the Court  
18    rejected the argument that exigent circumstances to search a  
19    defendant's parked vehicle ended with the arrest of the  
20    defendant outside of the parked vehicle, stating -- and I  
21    quote -- "it is, thus, clear that the justification to conduct  
22    a warrantless search does not vanish once the car has been  
23    immobilized, nor does it depend on a reviewing court's  
24    assessment of the likelihood in each particular case that the  
25    car would have been driven away or that its contents would have

1     been tampered with during the period required for the police to  
2     obtain a warrant."

3             We obviously have a lot less than that scenario here  
4     and, thus, the exigency still existed. At the time Douglas'  
5     car was searched, police knew the car was operational because  
6     not only was it parked on the street, but Douglas had just  
7     driven it.

8             In *United States v. Ramos*, 9 --

9             THE COURT: One moment.

10            MR. SCHILLER: Oh, yes, ma'am.

11            THE COURT: Again, I'm focused here on the facts for a  
12     minute. Where in the stipulated facts does it indicate when  
13     the vehicle was actually searched?

14            MR. SCHILLER: I don't know that the time is in there,  
15     Your Honor. Let me see.

16            So if you go to the bottom of page 7, agents executed  
17     the search warrant at the residence at 9:00 p.m. This is  
18     immediately after Douglas was arrested. And you heard  
19     Agent Myers testify that they talked to the -- the Douglas  
20     women for about 20 to 30 minutes, got the signed consent, and  
21     then sent it over to the agents on scene, which is when the  
22     search was conducted. So roughly 30 to 45 minutes.

23            THE COURT: Okay.

24            MR. SCHILLER: I didn't -- I didn't timeline it out.

25            THE COURT: That's okay. Please continue.

1 MR. SCHILLER: Yes, ma'am.

2 THE COURT: Okay. So we measure the exigency at which  
3 point?

4 MR. SCHILLER: We measure the exigency at the time it  
5 occurs.

6 THE COURT: And what's the "it"? The search or the  
7 seizure of the car?

8 MR. SCHILLER: The seizure.

9 THE COURT: Okay. And when did the seizure of the car  
10 occur?

11 MR. SCHILLER: The defendant was arrested right around  
12 9:00 p.m., when the search warrant was -- right at almost the  
13 same time the search warrant was executed, Your Honor will note  
14 that -- I'm sorry. So if you go to the bottom of page 60,  
15 at -- four lines up from the bottom, "At approximately  
16 7:45 p.m., Douglas drove the Highlander at the corner of West  
17 Norte Parkway and 7 Oaks Road. Agents noticed the amber  
18 emergency lights were flashing from the windshield as he drove  
19 past through the intersection and over the speed limit."

20 And then the next several paragraphs detail the  
21 eventual stopping of the car. Now, it doesn't say exactly when  
22 that happened; I know. I didn't put the time in there. But we  
23 do know that that time -- last timestamp that is stipulated in  
24 there is at 7:45 p.m., and then the signed consent was  
25 somewhere around 9:30, 9:45.

1           So we know that the defendant's vehicle was  
2   stopped -- if you just even take the -- a reasonable amount of  
3   time that all of these things happened, going from the bottom  
4   of page 5 through page 8, we're -- we're talking about,  
5   you know, a relatively short period of time. So there is a  
6   short period of time from 7:45 until the consent was signed.

7           THE COURT: Okay. So just looking at exigency,  
8   understanding that for purposes of determining whether there  
9   was still an exigency --

10          MR. SCHILLER: Yes.

11          THE COURT: -- we are looking at the approximate time  
12   the vehicle was seized.

13          MR. SCHILLER: Yes.

14          THE COURT: Okay. So what are the facts at that time,  
15   in your view, stipulated that support the ongoing exigency?

16          MR. SCHILLER: That the defendant had raised in his  
17   hand what appeared to be a live grenade. That at the time that  
18   the grenade was put down and he was taken out of the car,  
19   weapons were found on his person, including knives. And they  
20   had to use a bomb squad technician to secure not only the  
21   grenade and finding that it was fake, but secure the rest of  
22   the vehicle to make sure, from at least his perspective, there  
23   were no other explosive devices.

24          THE COURT: Okay. Everything you just described, is it  
25   in the stipulated facts?

1 MR. SCHILLER: Yes, ma'am.

2 THE COURT: Okay. All right. So the exigency, as you  
3 have described it, is the existence of weapons and other  
4 explosives --

5 MR. SCHILLER: Correct.

6 THE COURT: -- all stemming from the grenade incident?

7 MR. SCHILLER: Yes, ma'am.

8 THE COURT: Okay.

9 MR. SCHILLER: Now, I would point the Court to  
10 *United States v. Ramos*, 933 F.2d 968, cited on page 14 of my  
11 response. It's an Eleventh Circuit opinion from 1991. And in  
12 there the Eleventh Circuit espoused several factors that may  
13 indicate exigent circumstances. It's not an exclusive list,  
14 but it is a very encompassing list. They include the gravity  
15 of the offense with which the subject is to be charged; a  
16 reasonable belief that the suspect committed the crime;  
17 probable cause that the suspect is armed; strong reason to  
18 believe that the suspect is on the premises or vehicle being  
19 entered; and likelihood that delay could cause destruction of  
20 evidence or jeopardize the safety of the officers.

21 So even in some small part we had each of these in this  
22 case. Obviously, the gravity of the crime is exceptionally  
23 significant. He was going to visit what he believed was an  
24 8-year-old child to sexually abuse that child. There was an  
25 arrest warrant for him; so the reasonable belief that he was

1 the suspect was there. Probable cause to believe that he was  
2 armed was clearly there based on what he did immediately before  
3 his arrest with the grenade, not to mention the woman who falls  
4 out of the car yelling "he is going to kill us all" and  
5 "grenade," which is contained in the factual summary. A strong  
6 reason to believe that the suspect is in the vehicle being  
7 entered. Well, he obviously was in the vehicle. And a  
8 likelihood that delay could cause destruction of evidence or  
9 jeopardy.

10 Now, although the bomb technician cleared it, the  
11 agents have no idea if there is something else there. So as  
12 they go and search through the car for exigency circumstances,  
13 they're also making sure for that purpose as well. The bomb  
14 technician is looking for bombs, but they want to make sure  
15 there is no other dangerous weapons or other circumstances  
16 there, as they would, given the gravity of the situation.

17 And so that is the argument for exigency. The last  
18 argument that I make is that the car was the instrumentality of  
19 the crime committed.

20 I want to start off this argument by quoting something  
21 from defense -- the defense motion. At docket entry 46,  
22 page 4, they write, "Probable cause did not exist because there  
23 was no evidence to indicate that Douglas had any items of  
24 evidence located in the Highlander when he was arrested.  
25 Douglas did not indicate during his communications with the UC,



1 that he had any relevant items in his possession while he was  
2 driving the Highlander, and he did not make any statements  
3 post-arrest to indicate that any relevant evidence would be  
4 found in the Highlander."

5 So his entire statement has been admitted. I will take  
6 that part first. And although we didn't listen to all of the  
7 relevant portions, it's in evidence. But during that  
8 interview, he -- he does provide that the items that were in  
9 the chat would be in the car. He says they are for someone  
10 else but that they are in the car; that's number 1. So that  
11 debunks defendant's second statement. And --

12 THE COURT: Now, just conceptually, this basis for  
13 admission of the evidence seized from the car. You say the car  
14 was an instrumentality of the crime committed. Is this  
15 separate from the automobile exception?

16 MR. SCHILLER: It is, ma'am. Because the car -- he was  
17 actually using the car to transport the items to help commit  
18 his crime and to get to the crime. So if somebody, let's say,  
19 commits a drug transaction, and officers know about it, and  
20 then they find him in a car later on that had nothing to do  
21 with the drug transaction at all, nothing at all, he is just  
22 sitting in his car and he gets pulled over for a stoplight, the  
23 car is not an instrumentality of the crime.

24 But here, he was driving the car on his way to go meet  
25 the child, had the items in the car that he was going to bring

1 to have sex with the child, which he had told the officer about  
2 both in phone call and in text and instant message, and,  
3 post-arrest, told the agents that those items would be in the  
4 car.

5 THE COURT: Okay. Conceptually, what case speaks to  
6 this exception, this instrumentality of the crime exception?  
7 Not in the context of automobile exception, but as its own  
8 stand-alone basis.

9 MR. SCHILLER: I cited on page 60 at the very bottom,  
10 page 15, *United States v. White*. It's a Sixth Circuit case.  
11 But it says, "Officers had reasonable ground to believe the  
12 automobile had been used to transport contraband, if only the  
13 two counterfeit notes, which were taken from the person of the  
14 defendant immediately after his arrest. Consequently, the  
15 officers had probable cause to seize the automobile as the  
16 instrumentality of the crime."

17 THE COURT: And this, in your view, operates as a  
18 separate exception from the automobile?

19 MR. SCHILLER: Yes. I think very often they are one  
20 and the same, but I think in this particular instance we can  
21 articulate them separately. They obviously have a lot of  
22 overlap, but we can articulate them even separately here.

23 THE COURT: Okay. Is there any Eleventh Circuit  
24 authority treating this as its own independent basis to resist  
25 suppression? I have --

1 MR. SCHILLER: Not that I --

2 THE COURT: I, candidly, haven't seen this species of  
3 an exception, so to speak, separate from automobile exception.

4 MR. SCHILLER: No, Your Honor. I was not able to find  
5 it. Not in the Eleventh Circuit.

6 THE COURT: Okay.

7 Okay. Anything further on the -- on the vehicle  
8 search?

9 MR. SCHILLER: No, ma'am. No.

10 Now, I just want to be clear about one thing, going  
11 back to the consent, if I may.

12 I am not discussing the declaration that the defense  
13 filed because it has not been offered as a piece of evidence at  
14 this hearing; and so, therefore, it's not relevant. And -- but  
15 if for some reason the Court needs me to address that, I would  
16 be happy to. But, again, it has not been moved in evidence for  
17 consideration by this Court.

18 THE COURT: Okay.

19 MR. SCHILLER: So if there is nothing further, I will  
20 turn it over to defense counsel.

21 THE COURT: Okay. Mr. Kirby, I would like to hear from  
22 you now on the arguments related to the search of the vehicle.  
23 And before you get started, I do want clarification that you  
24 are not relying on the declaration that was previously attached  
25 to one of your filings in this case.

1 MR. KIRBY: Well, Your Honor, I -- I am relying upon  
2 that. And, Your Honor, if Your Honor needs me to move that  
3 into evidence, I would ask that that be moved into evidence.

4 THE COURT: Well, specify exactly what you're referring  
5 to because I asked you earlier if you had any evidence  
6 introduced at this hearing, and you told me no, and the only  
7 possibility was a future expert report examining Ms. Patricia  
8 Douglas' signature.

9 MR. KIRBY: Well, then I misspoke, Your Honor.  
10 I -- the declaration of Ms. Patricia Douglas, I would move into  
11 evidence, Your Honor.

12 THE COURT: Where is it in the record?

13 MR. KIRBY: It is attached to my -- it is attached to  
14 my opposition to their --

15 THE COURT: Mr. Howes.

16 MR. HOWES: Judge, if I could help. We filed a notice  
17 of filing of that particular document.

18 THE COURT: Okay. I need to see the actual  
19 declaration. If you're purporting to admit an exhibit at this  
20 hearing, I need to see it.

21 MR. HOWES: Okay.

22 THE COURT: Do you have it?

23 MR. HOWES: I will get it. I think I have it.

24 MR. SCHILLER: It's at docket entry 54-1, Your Honor.

25 MR. HOWES: There you go.

1 MR. KIRBY: Your Honor, this will be Defense Exhibit A.  
2 The government has that exhibit, Your Honor. Would you like me  
3 to approach --

4 THE COURT: Hold on.

5 Is there any objection from the government to admission  
6 of this defense exhibit -- I don't use letters, Mr. Kirby. So  
7 what is your number for that?

8 MR. KIRBY: 1.

9 THE COURT: Okay. Any objection to Defense Exhibit 1  
10 which is described as what exactly?

11 MR. KIRBY: It is the declaration of Patricia Gayle  
12 Douglas.

13 MR. SCHILLER: Yes, the government objects.

14 THE COURT: Okay. What is your basis for objection?

15 MR. SCHILLER: Hearsay.

16 THE COURT: Okay. Sustained.

17 Do you have any method of overcoming the hearsay  
18 objection?

19 MR. KIRBY: Not at this time, Your Honor.

20 THE COURT: Okay. Well, this is the evidentiary  
21 hearing; of course, this is your chance to do so. So I want to  
22 make sure you understand that this is the time at which you  
23 would need to present any evidence to support admission of that  
24 declaration, which is otherwise clearly hearsay.

25 MR. KIRBY: Well, Your Honor, Ms. Douglas is not able

1 to travel or testify, so at this point, no, Your Honor.

2 THE COURT: Okay. All right. Well, because that  
3 declaration is hearsay, because there has been no evidence to  
4 support its admission -- and, in fact, there was a motion to  
5 continue expressly stating that Ms. Douglas is not able to  
6 testify given her physical and mental infirmities -- then I  
7 don't see a basis to admit that declaration, and it won't be  
8 part of the hearing record on the motions.

9 Okay. So anything further on the declaration?

10 MR. KIRBY: No, Your Honor.

11 THE COURT: Okay. Then let me hear your argument in  
12 response to the government's submission, which is that there  
13 are multiple reasons to deny suppression of the evidence seized  
14 from the vehicle, starting first with consent.

15 MR. KIRBY: Yes, Your Honor.

16 With regard to consent, I believe that we have made our  
17 position clear. Our position is that Ms. Patricia Douglas did  
18 not sign the waiver that's been submitted as evidence in this  
19 case. We will seek to reopen, but I think the record has been  
20 made to the extent it can be made at this point.

21 THE COURT: Okay. So at this time do you have anything  
22 further on the consent piece?

23 MR. KIRBY: No, Your Honor.

24 THE COURT: Then I will await your motion to reopen.  
25 And, again, that's limited just to the expert issue that you

1 identified in your motion to continue this hearing.

2 MR. KIRBY: Yes, Your Honor.

3 THE COURT: Okay. All right then. Turn to the other  
4 grounds, please.

5 MR. KIRBY: Yes, Your Honor.

6 As to exigency, Your Honor, at the point the government  
7 searched Patricia Douglas' vehicle, Mr. Douglas had been  
8 removed from the vehicle, the -- the agents had ascertained  
9 that the purported grenade was actually a plastic prop, and  
10 they -- they had seized the vehicle. It was not going in  
11 there -- going anywhere. There was no exigency at that point.  
12 There was no reason for them not to go get a warrant, which  
13 would have been the normal course. All exigency to search that  
14 vehicle at that moment without -- without a warrant had  
15 dissipated. So there was no exigency to search the vehicle at  
16 that point.

17 THE COURT: What do you say to the government's  
18 citation to *Parrado* which is described by the government as a  
19 case in which the Eleventh Circuit rejected the notion that  
20 exigent circumstances to search a defendant's parked car ended  
21 with the arrest of the defendants outside that parked vehicle?

22 MR. KIRBY: Well, Your Honor, I'm not sure of all of  
23 the circumstances that -- surrounding that. I'm just talking  
24 about the facts of this particular case.

25 In this particular case, the vehicle had already been

1 searched subject to -- had already been seized subject to  
2 Mr. -- Mr. Douglas' arrest; so I'm not sure if his parked  
3 vehicle had already been seized or not. In this case the  
4 vehicle was in the custody of the government. So it wasn't  
5 going anywhere. It could not go anywhere.

6 THE COURT: But, I mean, perhaps the issue is not  
7 whether it could have gone anywhere. It's more whether it  
8 contained explosives or other dangerous weapons, given -- given  
9 the grenade issue that Mr. Douglas had displayed, even if later  
10 determined to be a dummy.

11 MR. KIRBY: I believe by that point, Your Honor, the  
12 government knew that the grenade was a dummy and was not real.  
13 And so at that point all exigency dissipated because there  
14 was -- there was no evidence that there was any explosive  
15 device whatsoever. It was a prop grenade.

16 THE COURT: There is a citation in the government's  
17 response to a case called *Forker*, which appears to suggest that  
18 we would measure the exigency at the time of the seizure of the  
19 car, not at the time of the search of the car. And so at the  
20 time the car was seized, at that point, would you not agree  
21 that there was still an ongoing exigency because it had not yet  
22 been determined to be a fake grenade?

23 MR. KIRBY: Well, I don't believe that there has been  
24 any evidence to that effect, Your Honor. As to when they  
25 determined -- I mean, Mr. -- Mr. Douglas was out of the



1 vehicle, the -- the grenade was in the government's custody, as  
2 far as the record reflects. So I'm not sure -- at that point  
3 they knew that there was no real grenade.

4 THE COURT: When you say "at that point," which point  
5 are you referring to?

6 MR. KIRBY: The point that Mr. Douglas had been  
7 arrested with the grenade -- the fake grenade in his hand.

8 THE COURT: Would you agree, though, that under those  
9 circumstances it would be reasonable to believe that he could  
10 have other explosive-type devices in his vehicle, having just  
11 presented one and scared a woman to the point of her yelling  
12 that she was going to be killed?

13 MR. KIRBY: I -- I -- Your Honor, as a matter of -- of  
14 this case, I don't know that I would agree that the government  
15 knew that Mr. Douglas had a fake grenade, that they would -- it  
16 would be reasonable for them to presume that there might be  
17 live grenades or other actual explosives in the vehicle.

18 THE COURT: Okay. All right. Anything further on  
19 exigency?

20 MR. KIRBY: No, Your Honor.

21 THE COURT: Okay. Then I would like to hear your  
22 argument on the automobile exception and then the search  
23 incident to arrest.

24 MR. KIRBY: Well, Your Honor, as far as -- I'm sorry.  
25 The automobile exception, Your Honor?

1           If I may, Your Honor, I believe that to some extent the  
2 same argument applies. I mean --

3           THE COURT: Which argument?

4           MR. KIRBY: That the -- the automobile is currently in  
5 the custody of the government and they certainly could have  
6 gotten a warrant --

7           THE COURT: That's not -- that's not the analysis.  
8 There are two prongs for this. The vehicle has to be readily  
9 mobile, i.e., operational, and agents have to have probable  
10 cause to believe that the vehicle contains contraband or other  
11 evidence of a crime.

12           MR. KIRBY: And I don't believe that there is -- there  
13 was probable cause. And I would --

14           THE COURT: Why? This is what I want to understand.

15           How can you contest the existence of probable cause to  
16 believe that the car contained contraband or evidence of a  
17 crime?

18           MR. KIRBY: Because there was nothing -- no statements  
19 by -- made by Mr. Douglas to indicate that at the moment he was  
20 driving that vehicle there was -- there was contraband within  
21 that vehicle. There was a -- a phone call concerning him going  
22 to meet with the girl and that there was a stuffed animal,  
23 perhaps, that -- that -- but there was no -- there was no  
24 evidence that it was in the car at that moment. There was  
25 nothing he said to state that the -- that the -- any evidence

1 of the crime was in the car at the moment that he was stopped.

2 He could have gone and picked it up later. There was  
3 just -- there was nothing at that point to indicate that there  
4 was any evidence in the car at that time.

5 THE COURT: Even though he had told the agent that he  
6 had purchased these items when the agent asked, "Do you have  
7 them," he said, "Yes." And, of course, he was on the way to  
8 meet the child?

9 MR. KIRBY: I don't believe he ever said he was on the  
10 way to meet the child at that point.

11 THE COURT: On the way to the meet-up location, based  
12 on the communications with the undercover.

13 In other words, the fact that he had agreed that he had  
14 bought these items or that he had acquired these items, and  
15 then, of course, he is going to that location, wouldn't it be  
16 reasonable to suggest at that point that he would have on his  
17 person the items that he said he would have?

18 MR. KIRBY: That's one interpretation, Your Honor.

19 THE COURT: Okay. Anything further on the automobile  
20 exception?

21 MR. KIRBY: No, Your Honor.

22 THE COURT: Do you dispute that the vehicle was  
23 operational?

24 MR. KIRBY: No.

25 THE COURT: Okay.

1           Okay. Then we have left the search incident to arrest.

2           MR. KIRBY: And, Your Honor, I believe the argument  
3   that Your Honor has already addressed reaches that. There is  
4   no evidence that there is not a separate trunk, and  
5   under -- under the -- that exception it does not reach the  
6   trunk area itself.

7           THE COURT: Okay. So, but there was evidence found on  
8   his person, you would agree, correct, based on the stipulated  
9   facts?

10          MR. KIRBY: Evidence on his?

11          THE COURT: "Person" as opposed to in the trunk.

12          MR. KIRBY: Of? There was certainly knives and the  
13   fake grenade were found on his person.

14          THE COURT: So it says here on page 7, "Search of  
15   Douglas incident to arrest, agents found the following on his  
16   person: Multiple knives, an anal plug, sex toy, and a wallet  
17   that contained his California ID, a Cash app debit card, as  
18   well as other identification."

19          MR. KIRBY: Those items -- yes, Your Honor, those  
20   items, yes, I believe, are admissible as incident to arrest. I  
21   was -- I was talking about the items found in the trunk area  
22   that -- in a separate box.

23          THE COURT: Okay. Anything further on the search  
24   incident to arrest?

25          MR. KIRBY: No, Your Honor.

1 THE COURT: Okay. Anything from the government with  
2 respect to these arguments? We're talking still about the  
3 vehicle.

4 MR. SCHILLER: No, Your Honor. Thank you.

5 THE COURT: Okay. All right. Well, then let me turn  
6 back to Mr. Schiller so we can discuss the second motion to  
7 suppress which concerns Mr. Douglas' post-arrest statements.

8 MR. SCHILLER: Thank you, Your Honor.

9 The defense's motion to suppress the statements occur  
10 at docket entry 47 and are responded to at docket entry 61.

11 The defense's motion is very, very void of exactly what  
12 they suggest is the statement or statements that caused him to  
13 ask for a lawyer and, thus, should have cut off questioning.

14 The only time they mention anything in their motion on  
15 page 2, the first full paragraph, is, "In addition,  
16 approximately 36 minutes into the interview Douglas invoked his  
17 right to counsel, after which agents should have immediately  
18 ceased the questioning of him." They don't say precisely what  
19 time or what statement he made.

20 And so having that, kind of, void to work within, I  
21 took the liberty of going through the recording line by line by  
22 line, or second by second by second, if you will, to try to  
23 isolate what those statements were. So that's -- begins on  
24 page 3. But they make a -- an argument before that that I want  
25 to touch on first. And I apologize for going out of order.

1           And that is, they say at no point did the agents  
2   receive oral or written waiver of his rights. Your Honor heard  
3   the recording. And at 4:25, after his -- the agents read him  
4   his Miranda rights, all of his rights, including his right to  
5   counsel -- and afterwards they ask him, "Do you understand all  
6   of those things?" And he responded, "Yes, ma'am."

7           THE COURT: Okay. Can I -- can you play clip one  
8   again, please.

9           MR. SCHILLER: Yes, ma'am.

10          Your Honor, I'm beginning at 4:15 on the recording.

11          (A video and/or audio was played.)

12          THE COURT: Okay.

13          MR. SCHILLER: Your Honor, I stopped the recording at  
14   5:22.

15          THE COURT: Okay. Thank you.

16          Please continue your argument.

17          MR. SCHILLER: Thank you, ma'am.

18          So I'm loathe to understand how he didn't knowingly  
19   orally waive his rights. Did he sign a Miranda waiver card?  
20   No, he doesn't need to. But he understood his rights. Agents  
21   understood what kind of education he had. And he expressed  
22   that he understood his rights by saying, "Yes, ma'am," when  
23   asked, "Do you understand all of those things?"

24          THE COURT: I think the argument that's being made is  
25   that he needed to be asked a separate question after that,

1     which is, having acknowledged his understanding of the rights,  
2     was he still willing to speak to the agent?

3             MR. SCHILLER: Right. I -- that's not the law. There  
4     is no magic words they need to ask him to make sure he  
5     understands his rights. In fact, I will go one step further.  
6     They don't need to do that last question at all. If he -- if  
7     you're reading Miranda rights, and some -- and the agent goes:

8             "Do you understand you have the right to counsel?"

9             "Yes."

10            "Do you understand you have the right to remain  
11     silent?"

12            "Yes."

13            And if you "yes" each one of those, you are good.  
14     If -- you can ask them all and say, "Do you understand all  
15     those rights?" "Yes." You don't have to follow it up by  
16     saying, "Do you wish to speak with me?" That is a thing that  
17     some officers do and some don't do. I suppose it adds one more  
18     level of protection, but it's not necessary under the Court's  
19     progeny of Miranda.

20            THE COURT: Okay. Thank you. Please continue.

21            MR. SCHILLER: Yes, ma'am.

22            Now, what I took the liberty of doing in response to  
23     the second argument which is "he invoked his right to counsel,"  
24     is I tried to, as best as I could, go through the recording,  
25     and isolate every time the defendant either mentioned the word

1 "lawyer" or referenced that he had mentioned the word "lawyer."  
2 And so I don't want to take the Court's time in rereading my  
3 response, but as you can see on pages 3, 4, and 5 of my  
4 response, every time the defendant suggests the word "lawyer,"  
5 the agents do exactly what the Eleventh Circuit -- and I will  
6 get to the case law in just a moment -- tells them to do, which  
7 is, if it's not equivocal, then you ask a question to find out.

8 "So you're saying you don't want to talk to us? You want a  
9 lawyer?" Because he didn't say, "I'm done talking to you."  
10 That's unequivocal. "I'm done talking to you." Easy.

11 But he throws out the word "lawyer" in a very  
12 convoluted, run-on sentence. And so the agents, to clarify  
13 what he means, ask him those follow-up questions. And that's  
14 what happens back and forth, back and forth. Repeatedly they  
15 ask him, "Wait. So are you saying you want a lawyer and you  
16 don't want" -- and he interrupts them before they can even  
17 finish the question at least eight or nine times. They are  
18 doing their best to communicate to Mr. Douglas so they  
19 understand what he wants to do.

20 And it appears that most of his references to  
21 "lawyer" -- the word "lawyer," excuse me -- are references to  
22 his lawyer -- well, lawyers that he had during his 2011  
23 previous conviction. But when he does mention it, possibly  
24 regarding the search of the phone and giving consent for the  
25 passcode or wanting to continue talking with them, and they try



1 to clarify, he rambles on and just keeps talking.

2 So even if -- even if it was considered an invocation,  
3 he reinitiates and just keeps talking. And the agents can't  
4 stop him from talking, as you heard from the audio recording.

5 So the Eleventh Circuit has been really, really clear  
6 on this issue. And I want to direct the Court's attention to  
7 *United States v. Ochoa*, O-C-H-O-A. It's an -- it's not a  
8 published opinion, but I thought the facts were really, really  
9 telling about our case. It's an Eleventh Circuit opinion from  
10 2019. The Westlaw cite is 2019 WL5491336. And I had cited it  
11 on page 7 of my response.

12 "The Courts denied the defendant's motion to suppress  
13 and held his post-Miranda statements admissible. During the  
14 last sentence of the reading of his Miranda rights, the  
15 officers read to Ochoa: I have read the statement of my rights  
16 and I understand what they are. At this time I am willing to  
17 answer questions without my lawyer -- without a lawyer  
18 present."

19 They read that to him.

20 The Court goes on to say, "After asking the officer to  
21 read the statement again, Ochoa insisted that he did not really  
22 agree with the last one, and, quote, 'You're asking me at this  
23 time if I'm willing to answer questions without a lawyer. I  
24 don't agree with that,' end quote."

25 The officer explained what the statement meant and

1 Ochoa then agreed to speak. The Court noted that "the parties  
2 did not dispute the facts that the defendant did not expressly  
3 state that he wished to consult an attorney or remain silent.  
4 The Court held it was appropriate for the officer to ask  
5 follow-up questions to clarify what Ochoa meant by his  
6 statements."

7 And then I went on to cite case after case after case  
8 where the Eleventh Circuit has specifically said that it is  
9 appropriate, nay important, for agents to clarify when an  
10 individual who is subject to his Miranda rights is invoking his  
11 right to counsel; to make sure that they understand it and to  
12 make sure that that's actually what you want to do. Maybe you  
13 do want to talk to us, but you said the word "lawyer," so, hey,  
14 hold on, that relates to your Miranda rights. Let's question  
15 it.

16 I cited *United States v. Propst*, P-R-O-P-S-T, on  
17 page 7, Eleventh Circuit, 2010, at 369 Fed.App'x 42, where the  
18 Court held the defendant's statement "I would rather have a  
19 lawyer around to talk" was considered ambiguous and did not  
20 require officers to terminate questioning. We don't even get  
21 close to that here. We don't.

22 Just a couple of other points I want to make.

23 The defendant in his motion brought up the Supreme  
24 Court case of *Jackson v. Denno* in his motion, seemingly wanting  
25 a Jackson hearing, but that really applies to what happens

1 during a trial, not so much a motion to suppress. So I cited  
2 that and the case law at the bottom of page 8, and I don't  
3 think it's relevant.

4 I would -- I would offer the Court this. If -- with  
5 your review that you have already heard of the statement, and  
6 if the Court takes further review of the statement in chambers,  
7 and if there is specific portions that need to be excised out,  
8 specifically -- I don't think this is true, but let's say it  
9 was -- that he invoked his right to a lawyer regarding giving  
10 his passport, which I don't believe he did based upon the  
11 conversation. We could excise out that one little line so the  
12 jury doesn't hear that one little part. Because individuals  
13 can invoke their right to counsel for specific things or for  
14 everything. And clearly the defendant here may have been  
15 offering that for specific things, dealing with the woman in  
16 the car, dealing with the phone, but never committed to it.  
17 Every time the officers tried to ask him -- and Your Honor  
18 heard the interview. Every time they tried to ask him and  
19 clarify, he interrupts them, talks over them, and doesn't stop  
20 rambling until he catches his breath. And it's during that  
21 two seconds of breathing that one of the agents says, "Okay.  
22 But you mentioned 'lawyer' before. So we just want to be  
23 clear. Do you want to still talk to us?" And he keeps  
24 talking.

25 So I think the agents really did absolutely everything

1 the Eleventh Circuit would have them do, recommends them to do,  
2 and requires them to do in these circumstances. And I don't  
3 believe there is any reason to suppress the statement  
4 whatsoever.

5 Thank you.

6 THE COURT: Okay. Now, just for my curiosity, is there  
7 anything incriminating on the recording?

8 MR. SCHILLER: Is there anything what, ma'am?

9 THE COURT: Incriminating on the recording.

10 MR. SCHILLER: Oh, yes. There are many things  
11 incriminating on the recording.

12 THE COURT: Okay. All right. Then let me hear from  
13 you, Mr. Kirby. I would like for you to be, please, be very  
14 clear about what in the recording specifically, pointing to  
15 timestamps, causes you concern because your motion is fairly  
16 general in nature.

17 MR. KIRBY: Yes, Your Honor.

18 Before I get to that -- and I will get to that in just  
19 a second -- I do want to, you know, put on the record,  
20 Your Honor, that the government has the burden of showing  
21 voluntariness in their -- did they follow the Miranda --  
22 Miranda specifically?

23 There was no written or oral waiver of Mr. Douglas'  
24 Miranda rights. The government has just --

25 THE COURT: Okay. Wait. First, answer my question,

1 and then you can make whatever arguments want.

2 What specifically in the recording causes you concern?

3 And you need to be -- you need to pinpoint what about the

4 recording, from -- from a timestamp perspective, is

5 problematic?

6 MR. KIRBY: I believe it is -- it is around minute 41  
7 to 42, where Ms. -- where the -- it is in the context of the  
8 passcode. But in that -- in that same discussion, there is  
9 a -- a question from the agents, "Do you still want to answer  
10 questions?" Mr. Douglas says -- I'm -- I don't want to  
11 misstate it. I want to say the exact words.

12 "If there are questions you want to answer, but not  
13 along these lines" -- at which point they continue to ask him  
14 questions along those lines.

15 THE COURT: Okay. This is what we're going to do.  
16 It's 11:40, and we're about ready for lunch anyway.

17 Over the lunch break, Mr. Kirby, please carefully  
18 scrutinize the recording. And when you come back to the  
19 lectern after lunch, I would like for you to specifically tell  
20 me the portions of the recording where you believe your client  
21 invokes his right to counsel, so that I can hone in on those  
22 portions. Because your motion is -- is fairly imprecise, and I  
23 want to make sure that I'm honing in on the timeline that you  
24 find most concerning. And then, of course, we will cover the  
25 threshold question whether he agreed to speak to begin with.

1 Okay. Any questions?

2 MR. KIRBY: No, Your Honor.

3 THE COURT: All right. It's 11:40. We will be in  
4 recess until 1:00 p.m.

5 MR. KIRBY: Thank you, Your Honor.

6 COURTROOM DEPUTY: All rise.

7 MR. SCHILLER: Your Honor, with the Court's permission,  
8 may we leave things at counsel's table?

9 THE COURT: Yes.

10 MR. SCHILLER: Thank you.

11 (A recess was taken from 11:43 a.m. to 1:02 p.m.).

12 THE COURT: Good afternoon. Please be seated.

13 Everybody is here. We are back in session, 23-80219, United  
14 States of America v. Michael Gordon Douglas.

15 We left off, Mr. Kirby, with your presentation on the  
16 motion to suppress statements. I asked that you clarify, over  
17 the break, the exact portions of the recording that you think  
18 implicate the right to counsel or the invocation of such. And  
19 so if we could start there, please.

20 MR. KIRBY: Yes, Your Honor.

21 I would just, in the context of my ethical duties,  
22 however -- I need to cite to a case which I believe stands for  
23 the proposition that a written waiver is not necessary under  
24 Eleventh Circuit law. And that's *Bernal* --  
25 *U.S. v. Bernal-Benitez*, 594 F.3d at 1318.

1 THE COURT: Okay. Thank you.

2 MR. KIRBY: You're welcome, Your Honor. And I spoke  
3 with Mr. Schiller and I believe he is ready to play from minute  
4 42, which would be the point that I will contend invocation was  
5 made.

6 THE COURT: Okay. Let's hear that portion of the tape  
7 then, please.

8 MR. SCHILLER: Thank you.

9 Judge, I'm having trouble hearing counsel. I don't  
10 know if his microphone is working or not working -- but it's  
11 just hard for me to hear you.

12 THE COURT: He said minute 42.

13 If you could just speak up, Mr. Kirby.

14 MR. KIRBY: Yes, Your Honor. Usually not a problem,  
15 but, yes.

16 MR. SCHILLER: Playing now, Your Honor.

17 (A video and/or audio was played.)

18 MR. SCHILLER: Judge, I stopped it at 42:11.

19 MR. KIRBY: Your Honor, he asked for a lawyer. They're  
20 going along the same line of questioning, and then they  
21 continue on.

22 THE COURT: But what is the line of questioning that is  
23 happening at that time? And then what is the line of  
24 questioning that happens after that statement?

25 MR. KIRBY: Your Honor -- I'm sorry. Mr. Schiller,

1 could you, perhaps, start it at 41 then, to give the Court some  
2 context.

3 MR. SCHILLER: Ready?

4 MR. KIRBY: Yes.

5 THE COURT: Okay. Mr. Schiller, please tell me where  
6 you're starting.

7 MR. SCHILLER: 41:01, Your Honor.

8 THE COURT: 41:01. Okay. Thank you.

9 (A video and/or audio was played.)

10 MR. KIRBY: Your Honor, for my purposes, we're done.

11 THE COURT: Okay.

12 MR. SCHILLER: Your Honor, we're at 42:21.

13 THE COURT: Okay. It's still not evident to me, having  
14 played from minute 41 on, what exactly the context was,  
15 Mr. Schiller.

16 So doing it in this piecemeal fashion, it's hard for me  
17 to understand what was being discussed prior to and then after  
18 the purported invocation of his right to counsel.

19 MR. KIRBY: Your Honor, we can back it up even further,  
20 if that would help the Court or we --

21 THE COURT: Well, it's your motion. And I just want  
22 you to present your arguments and explain exactly what do you  
23 think in the recording indicates that he invoked his right to  
24 counsel, and why isn't it clear that the agent shifted gears  
25 and started discussing something else, something different than



1 what was previously being discussed?

2 MR. KIRBY: Well, I -- I believe it -- it's clear that  
3 he is invoking his rights at that point, Your Honor.

4 THE COURT: Based on what? What did he say in the  
5 recording that you believe amounts to that clear, unequivocal  
6 invocation?

7 MR. KIRBY: If you have any more questions along that  
8 line, then "lawyer."

9 THE COURT: Mr. Kirby, you need to do a little bit more  
10 than just, sort of, generally point things out. Where in the  
11 recording is the purported invocation, so I can go and I can  
12 listen to this recording? I asked you specifically over the  
13 break to focus on the recording so that I could hone in on the  
14 relevant portions.

15 What I heard the defendant say was, "If it's the same  
16 line of questioning," and then "we're done." And then at that  
17 point the question by the agent is, "Who else have you sent  
18 child pornography to besides Anna?"

19 So isn't that a new topic, a new line of inquiry?

20 MR. KIRBY: Well, Your Honor, I would argue that  
21 they're all of a piece.

22 THE COURT: All right. So other than this 42:11 minute  
23 marker that you've identified, are there any other portions of  
24 the transcript where you think Mr. Douglas clearly invoked his  
25 right to counsel?

1 MR. KIRBY: Simply in the -- in the portions leading up  
2 that we have already heard, Your Honor.

3 THE COURT: Which are? We had three clips this  
4 morning.

5 MR. KIRBY: Okay. The clip that started -- the last  
6 clip we heard that I believe was in the record, Your Honor.

7 THE COURT: So that's clip 3. Mr. Schiller, if you  
8 could -- of course, standing when you address the Court -- is  
9 this 56:29 to 57:30?

10 MR. SCHILLER: That would be the last clip the  
11 government played, Your Honor, yes, ma'am.

12 THE COURT: That's the clip you're relying on,  
13 Mr. Kirby?

14 MR. KIRBY: No, Your Honor. I believe it was -- it was  
15 41 -- minute 41 to stop -- the place that we stopped just now.

16 THE COURT: Oh, okay. Sorry. I was asking whether, in  
17 addition to that minute 41 count, were there any other portions  
18 of the recording that you were relying on for your argument  
19 about invocation of counsel?

20 MR. KIRBY: That's where I believe a clear invocation  
21 was made, Your Honor.

22 THE COURT: At the 41-minute marker, okay.

23 MR. KIRBY: 41 to 42, yes.

24 THE COURT: Your motion, does it address any other  
25 portions in the transcript? Or, excuse me, there is no

1 transcript. In the recording.

2 MR. KIRBY: Your Honor, that's what I am -- I am  
3 relying on today for this motion to suppress.

4 THE COURT: Okay. Docket entry 47, which is your  
5 motion, refers to approximately 36 minutes into the interview.  
6 What happened at that point?

7 MR. KIRBY: Your Honor, upon re-evaluating the tape, I  
8 believe that the 41 to 42 is more succinct and accurate a  
9 portion.

10 THE COURT: All right. So, to be clear, your motion  
11 with respect to suppression of statements and on the topic of  
12 invocation, I should be focusing only on this last excerpt,  
13 which starts at approximately minute 41?

14 MR. KIRBY: Yes, Your Honor.

15 THE COURT: Okay. And so your argument on that point  
16 is what exactly?

17 MR. KIRBY: That, at that point, Mr. Douglas has made a  
18 clear invocation of his right to counsel, that he doesn't want  
19 to speak further with the agents, that he wants to speak with  
20 an attorney.

21 THE COURT: Okay. All right. Then let's turn to your  
22 other argument in the motion which concerns the waiver to begin  
23 with. And I understand your acknowledgement, rightly so, that  
24 a written waiver isn't required, that an oral waiver would be  
25 sufficient.

1           What is your argument, given what we heard in clip 1 at  
2   the outset of today's hearing?

3           MR. KIRBY: Well, Your Honor, clearly a written waiver  
4   is not required in the Eleventh Circuit. I have not found any  
5   controlling authority one way or the other as to the  
6   Eleventh Circuit under -- as far as an oral motion, but I -- an  
7   oral waiver. But I would argue that an oral waiver -- at the  
8   very least, the government should be required to receive some  
9   sort of affirmative waiver from the defendant that he not only  
10   understood his rights but acquiesced, rather than simply he was  
11   read his rights, asked if he understood those rights, and with  
12   nothing more, questioning begins.

13          THE COURT: Okay. Just so I understand your argument,  
14   although he clearly acknowledges each of the rights that were  
15   verbally read to him, your position is that the agent was  
16   required to ask him another question in saying what exactly?

17          MR. KIRBY: He acknowledges that he understands them,  
18   but the officer needed to ask him and receive an assertion  
19   that, yes, he understands them and he waives them, or he agrees  
20   to speak with the agents.

21          THE COURT: Okay.

22          Okay. And then just to clarify, there was a suggestion  
23   in your motion to notions of voluntariness, citing  
24   *Jackson v. Denno* and other authorities. Are you making an  
25   argument that the defendant's statement was not voluntary under

1 the totality of the circumstances because it was not the  
2 product of an essentially free and unconstrained choice?

3 MR. KIRBY: I am not, Your Honor.

4 THE COURT: Okay. So that argument is abandoned, just  
5 to be clear?

6 MR. KIRBY: Yes.

7 THE COURT: All right. Okay. Then any other arguments  
8 on the statements themselves?

9 MR. KIRBY: No, Your Honor.

10 THE COURT: All right. Thank you.

11 Mr. Schiller, do you care to respond to any of the  
12 arguments made thus far?

13 MR. SCHILLER: No, Your Honor. I have expressed all my  
14 arguments already. Thank you.

15 THE COURT: Okay. All right. Anything else on the  
16 suppression motions that we've covered today, which are docket  
17 entries 46, 47, and 48, from either side?

18 MR. SCHILLER: Judge, if I could -- during the lunch  
19 break I happened to find a case on an issue that Your Honor  
20 was -- had brought up during my arguments about the motion to  
21 suppress the search of the car, and specifically the trunk.

22 THE COURT: Okay.

23 MR. SCHILLER: And I will bring it up for the Court's  
24 review and consideration. It is *United States v. Lanzon*,  
25 L-A-N-Z-O-N, 639 F.3d 1239. It's an Eleventh Circuit opinion

1 from 2011. In that case "law enforcement had probable cause to  
2 search the defendant's truck under the automobile exception for  
3 warrantless searches where the defendant had participated in  
4 instant messaging conversations with an officer posing as the  
5 father of a 14-year-old girl, described his intent to have sex  
6 with the 14-year-old girl, agreed to meet at the specific time  
7 and place, agreed to bring certain condoms, and addressed the  
8 officer by his undercover persona. When officers did not find  
9 the condoms after a pat-down, there was probable cause to  
10 search his truck for evidence of a crime."

11 So they were able to search the entire truck, is what  
12 I'm getting at. And so I think that because, when the officers  
13 obviously took the defendant out of the car didn't find all of  
14 the items that he would have possessed and told the agent he  
15 was going to possess, they then would have had the right to  
16 then search the entire car, including the trunk purposes, under  
17 the automobile exception.

18 I wanted to provide that to the Court if the Court  
19 wanted to take a look at that case. And I thank you very much.

20 MR. KIRBY: I'm sorry, Mr. Schiller. Could I -- you  
21 said that cite a little quickly. Can I get the back end of it,  
22 please.

23 MR. SCHILLER: Yes. *United States v. Lanzon*,  
24 L-A-N-Z-O-N, 639 F.3d 1293. Eleventh Circuit, 2011.

25 MR. KIRBY: And I'm missing where they said they could

1 search the bed of the truck.

2 MR. SCHILLER: No. It just said to search the entire  
3 truck. That was my understanding of the case. But --

4 THE COURT: Okay.

5 MR. SCHILLER: Thank you, ma'am.

6 THE COURT: All right. That's distinct from the search  
7 incident to arrest, *New York v. Belton*, discussion we were  
8 having, correct, in talking about automobile exception which  
9 wouldn't have that trunk limitation.

10 MR. SCHILLER: Correct, ma'am. I just wanted to  
11 provide that to the Court as well.

12 THE COURT: Yes.

13 MR. SCHILLER: Thank you.

14 THE COURT: All right. Mr. Kirby, if you wish to  
15 respond via a response to supplemental authority, you may do so  
16 in accordance with the local rules which have a word limit.

17 MR. KIRBY: Thank you very much, Your Honor.

18 THE COURT: Okay.

19 Okay. So I think we've covered fully the suppression  
20 motions. So now let's turn to the government's omnibus motion  
21 in limine. Before we get started, I want to understand if  
22 there are any areas of agreement between the parties since the  
23 filing of the government's motion.

24 Mr. Schiller.

25 MR. SCHILLER: Yes, ma'am. Thank you.

1           As directed by the Court, the parties filed a status  
2   report regarding today's hearing at docket entry 83. And  
3   amongst other matters, including the motions to suppress that  
4   we've already covered, at page 2, items number 7, 8, and then 9  
5   on page 3, I have identified those areas that the parties are  
6   agreeing to, and I will provide those to the Court now.

7           First, in the government's motion, omnibus motion in  
8   limine regarding the summary data, we have yet to provide those  
9   summaries. And there hasn't been an objection to us providing  
10  those summaries. I know that is not a major issue, probably,  
11  for the Court or the parties this morning, but I just  
12  wanted -- because that's part of the omnibus motion, I just  
13  wanted to note that. But we are working on those and we will  
14  provide them to the defense as soon as we have them.

15           THE COURT: Okay. Hold on. Before you move past the  
16  summaries.

17           MR. SCHILLER: Yes, ma'am.

18           THE COURT: These would be summaries of voluminous data  
19  found on what device?

20           MR. SCHILLER: His Samsung phone, his Verizon phone,  
21  and his Google accounts.

22           THE COURT: And in terms of the categories of data,  
23  what would you be seeking to summarize?

24           MR. SCHILLER: At this point, I'm not sure what we're  
25  going to use, Judge. So I -- so I can't tell the Court with



1 any specificity; I apologize. But, I mean, generally it would  
2 include images, videos, usually summary charts that show total  
3 numbers of things, a listing of accounts that were found on the  
4 device, or the account -- I know that sounds repetitive -- but  
5 the accounts within the Google accounts, in a more compressed  
6 list that will allow both defense, government, Court, and the  
7 jury to piece through everything in less than thousands and  
8 thousands of pages. That's typically what we do in our cases  
9 and I would purport to do in this case. There might be some  
10 other things, but we will provide that to the defense in  
11 advance of trial.

12 THE COURT: Okay. So what I'm hearing is, really, that  
13 this portion of the motion seeking to use summaries of data  
14 pursuant to Federal Rule of Evidence 1006 is not ready for  
15 judicial resolution; correct?

16 MR. SCHILLER: Right, Judge. My guess is we will be  
17 able just to agree on those things, but if we do have an issue,  
18 we will bring that back to the Court.

19 THE COURT: Okay. All right. Mr. Kirby, do you wish  
20 to be heard on this aspect of the motion?

21 MR. KIRBY: So long as we have the search warrant  
22 affidavits and -- showing the admissibility of this  
23 information, no, Your Honor, I haven't seen those search  
24 affidavits yet.

25 THE COURT: All right. This brings up a different

1 issue.

2 MR. KIRBY: Yes, it does, Your Honor.

3 THE COURT: Can you clarify what it is that you haven't  
4 received.

5 MR. KIRBY: I think Mr. Howes wishes to speak.

6 MR. HOWES: Judge, there was --

7 THE COURT: Please get before a microphone.

8 MR. HOWES: I thought my voice carried better than  
9 that, Your Honor. Here, let me take my ear out and I will  
10 probably speak better now.

11 Your Honor, today, going through the documents that are  
12 here, I have -- I count three different search warrants that we  
13 have no probable cause affidavit, no search warrant, and no  
14 inventory and return on. One was of the house where the  
15 defendant resided. There would be an issue with respect to  
16 whether or not the telephones that -- that, according to the  
17 government's reporting, came out of that search was within the  
18 terms of the affidavit and the search warrant.

19 So that's -- that's one.

20 Another one is --

21 THE COURT: Okay. Wait. Let's just pause there.

22 So do I hear you correctly that you're saying you have  
23 not, in discovery, received copies of search warrants or  
24 affidavits --

25 MR. HOWE: Affidavits --

1           THE COURT: -- in support of the warrant applications  
2     or the inventories themselves for three separate searches of  
3     what?

4           MR. HOWES: Of one was of his residence, another was if  
5     they sent -- we've got a two-page letter from -- from Google.  
6     If they sent search warrants to Google, then we're entitled to  
7     those. And we -- and if they conducted any type of use of the  
8     contents of the -- the phones, then we're entitled to those  
9     search warrants as well. I mean, they -- I'm looking at  
10    this --

11          THE COURT: Okay. All right. Just -- this might be an  
12    issue that just needs to be clarified.

13          Mr. Schiller.

14          MR. SCHILLER: Judge, we've given them every search  
15    warrant affidavit, warrant application, cover letter that has  
16    existed in this case. It's all been provided in discovery. I  
17    can't confirm and tell the Court exactly what page number  
18    within the discovery it is because I can't get online inside  
19    the Court's courtroom, but I can guarantee the defense we have  
20    provided all of it and it was all provided in the initial round  
21    of discovery, which was quite voluminous and hundreds of pages.  
22    But everything is there.

23          THE COURT: Okay. So is it just an issue of review  
24    of -- fully of these materials, then?

25          MR. HOWES: I will -- I will go back while we're here

1 today, Judge, and see if I can find them. If it was in the  
2 first discovery response, then they're there.

3 THE COURT: Okay. Well, then it appears that all of  
4 these materials have been provided to you. If there is some  
5 issue that you have identified, then you should file an  
6 appropriate motion.

7 MR. HOWES: Yes, ma'am.

8 THE COURT: Okay. We got off track there a bit. We  
9 were talking about the 1006 summary issue. I'm going to  
10 reserve ruling on that aspect of the motion pending trial. At  
11 which point then, Mr. Kirby, if you have any objections related  
12 to the reliability of the underlying records or the summaries  
13 themselves, then you should preserve those objections  
14 accordingly. But as a theoretical matter, it doesn't seem to  
15 me problematic for the government to assist the jury through  
16 the use of summaries of this voluminous data.

17 Anything further on this portion of the motion?

18 MR. KIRBY: No, Your Honor.

19 THE COURT: Mr. Schiller.

20 MR. SCHILLER: No, Your Honor. Thank you.

21 THE COURT: Okay.

22 MR. SCHILLER: At docket entry 83, line item number 8,  
23 we refer to part 4 of the government's omnibus motion in  
24 limine, which is the motion in limine to publish child  
25 pornography. There has been no response or opposition filed by

1 the defense at this point. And what the government will  
2 purport to do in trial is select a limited number of items from  
3 the defendant's phones and Google accounts, if the Court is  
4 going to admit that pursuant to our 404(b), 414, and  
5 inextricably intertwined motion to produce, along with the  
6 child pornography that was distributed specifically by the  
7 defendant to the undercover officer in the course of their  
8 chats.

9 THE COURT: Okay. Let's start first with just the  
10 charged counts.

11 MR. SCHILLER: Yes, ma'am. I should have --

12 THE COURT: What is your plan on the charged counts?

13 MR. SCHILLER: So, the charged counts are all consumed  
14 within a video recording or screenshots of all the chats that  
15 the defendant had with the undercover agent. We are going to  
16 play the video recordings or screenshots of those conversations  
17 to the jury. And the undercover agent, who will be testifying  
18 about those, and I, will read through them for the jury.

19 During those conversations is when child pornography  
20 was distributed. And it will be played. Sometimes it's long,  
21 so we will cut down, to a very limited portion, for the jury to  
22 see. Because that is what he has been charged with and they  
23 have to make a determination of it. That is for what he has  
24 been charged with.

25 THE COURT: So on the seven counts --

1 MR. SCHILLER: Yes, ma'am.

2 THE COURT: -- looking at the superseding indictment,  
3 would these be seven still images?

4 MR. SCHILLER: No. They're videos.

5 THE COURT: Well, I understand they're videos. But as  
6 far as what you seek to publish to the jury from the videos, so  
7 that we're not going to be playing lengthy videos of child  
8 pornography.

9 MR. SCHILLER: So our intention was to play the videos,  
10 but we will play only a very small portion of the video, a  
11 matter of seconds. Some of the videos are quite lengthy,  
12 upwards of a minute or more. We will not do that.

13 THE COURT: Okay. So let me turn to Mr. Kirby. I did  
14 not see any substantive response to this aspect of the motion,  
15 Mr. Kirby. So can you please explain to me if you have an  
16 objection to what Mr. Schiller has described.

17 MR. KIRBY: As long as it's not excessive, Your Honor,  
18 I do not have an objection as to the counts, Your Honor.  
19 And -- well, we can deal with the counts for now. I do not  
20 have an objection, Your Honor.

21 THE COURT: Okay. So what I have heard so far is for  
22 the seven charged counts of distribution of child pornography,  
23 the government proposes to play very brief excerpts from each  
24 of those videos, seconds for each of them. And that, so long  
25 as the government stays within that rubric, you have no

1 objection. Did I hear you correctly?

2 MR. KIRBY: Yes, you did, Your Honor.

3 THE COURT: Okay. All right. So I think we've covered  
4 the charged counts.

5 Mr. Schiller, now turn to any requests you have to  
6 publish child pornography beyond the charged counts.

7 MR. SCHILLER: Okay, Judge. Thank you.

8 So this now gets into the larger portion of the omnibus  
9 motion in limine in regards to the inextricably intertwined  
10 404(b) and 413 evidence.

11 So if you want me to put those two together...

12 THE COURT: Unless there are other areas of agreement  
13 that you haven't yet covered, then, yes, please, segue into  
14 that.

15 MR. SCHILLER: Okay. There is one other area of  
16 agreement.

17 THE COURT: Okay. Let's finish that then.

18 MR. SCHILLER: Okay. On page 3 of docket entry 83, the  
19 status report for today's hearing, the defendant has previously  
20 objected to the government's introduction in evidence at trial  
21 of the facts of the Defendant's 2011 conviction. But for  
22 purposes of litigating the motion today, the parties stipulate  
23 to the facts as alleged in the government's motion in limine,  
24 at docket entry 62, pages 2 through 5, as the facts the  
25 government would produce at trial through witnesses. And the

1 parties agree that the government does not need to present  
2 those witnesses at the motion hearing today to support those  
3 facts.

4 THE COURT: Okay. Pages 2 through 5 of docket entry  
5 62.

6 MR. SCHILLER: Correct, ma'am.

7 THE COURT: Mr. Kirby, do you agree with that?

8 MR. KIRBY: For purposes of today's hearing, yes.

9 THE COURT: Okay. The dispute here with the prior 2011  
10 conviction, is it correct that all parties agree that at least  
11 the fact of the conviction via certified judgment would be  
12 admissible to the jury? Mr. Kirby; is that correct? For  
13 purposes of the sentencing enhancement that is charged in the  
14 indictment.

15 MR. KIRBY: For purposes of the sentencing enhancement,  
16 yes, Your Honor.

17 THE COURT: So what do you agree to so that I can  
18 figure out what is actually disputed?

19 MR. KIRBY: I agree that the sentencing  
20 enhancement -- for purposes of the sentencing enhancement, that  
21 that conviction can be disclosed to the jury. What I object to  
22 are introduction of the facts related to that 2011 conviction.  
23 I believe it's -- and I can go into the argument, or not.

24 THE COURT: Okay. So, as far as -- so, just so I  
25 understand, in terms of paperwork, you would be -- you would



1 not be objecting to introduction of the certified judgment for  
2 that 2011 conviction; correct?

3 MR. KIRBY: For purposes of sentencing, correct.

4 THE COURT: Okay. But also during trial? To the jury,  
5 just to be clear.

6 MR. KIRBY: For purposes of the enhancement, yes.

7 THE COURT: Which would necessarily be exposed to the  
8 jury?

9 MR. KIRBY: Yes.

10 THE COURT: Okay.

11 Okay. So then the area of dispute is whether to go  
12 beyond the judgment and call a witness to testify about the  
13 underlying facts associated with that conviction; is that  
14 right?

15 MR. SCHILLER: That is right, Your Honor.

16 THE COURT: Okay. So why does the government believe  
17 it needs to go that extra step and go into the details of the  
18 2011 conviction?

19 MR. SCHILLER: Sure.

20 So this all relates to the government's 414 -- the  
21 motion -- the omnibus motion in limine to admit that evidence  
22 under Federal Rule of Evidence 414 and 404(b).

23 And does Your Honor want me to go into argument about  
24 that now?

25 THE COURT: All right. So the areas of dispute that

1 are left are -- the underlying fact for the 2011 conviction and  
2 then use of the -- what the government has described as an  
3 inextricably intertwined evidence in the form of Google  
4 accounts and other child pornography found on the devices; is  
5 that right?

6 MR. SCHILLER: Yes. And there is a few other things,  
7 but it is all found within the devices in the Google accounts.

8 THE COURT: Okay. So at this point I will let you take  
9 it from here. You can present your argument as you wish on  
10 these two buckets of disputed evidence.

11 MR. SCHILLER: Okay. Thank you.

12 So the other evidence the government wants to introduce  
13 that are other bad acts committed by the defendant and  
14 uncharged fall into one of three buckets; either inextricably  
15 intertwined, 414 evidence, or 404(b) evidence. And each of  
16 them, as defense counsel noted in their response and I noted in  
17 my motion, requires a 403 balancing test. So I'm going to  
18 address each of those three-levels of introduction, and then I  
19 will end with a 403 balancing test at the end.

20 The evidence that we want to introduce is captured  
21 within docket entry 62 in, really, three buckets. The first  
22 bucket is the evidence of the prior conviction and the facts of  
23 that prior conviction. I have outlined those facts on pages 2,  
24 3, 4, and 5. And, Your Honor, those facts come almost word for  
25 word from the appellate decision upholding the defendant's 2011

1 conviction and the factual summary as laid out by the appellate  
2 court in California, the state court. So that's where I really  
3 took those from because it's a published opinion.

4 That's one bucket. And I will explain why that's  
5 admissible in just a minute.

6 The second bucket is evidence found from the  
7 defendant's two phones, the one found on the floorboard of his  
8 car -- the broken phone -- the cracked-screen phone, excuse  
9 me -- and then a second phone found within his residence. Both  
10 of those phones have been identified as belonging to the  
11 defendant, based on an innumerable amount of evidence about his  
12 email addresses, phone numbers, usernames.

13 And from those two devices we want to introduce the  
14 following five things: One, his possession of child  
15 pornography on those devices, some of which were the exact same  
16 items that he distributed to the undercover agent in the chat  
17 room. Two, other distribution and receipt of child pornography  
18 in the same application that he used in this case, in text  
19 messaging and other applications to other individuals not the  
20 undercover agent, from July through November of 2023. Thus,  
21 overlapping the time period that he was communicating with the  
22 agent.

23 THE COURT: The time period here is November/December  
24 of 2023?

25 MR. SCHILLER: That's right. So this extends just a

1 little bit before that. We're not looking to admit chats that  
2 he had back in, you know, 2000 or 1998, except for the prior  
3 conviction because he was actually convicted of that.

4 And then there are three other small buckets of items  
5 that we want to introduce that came out of his phones,  
6 including evidence that he was engaging in chat rooms that were  
7 entitled -- that were related to teen girl videos or had some  
8 reference to "teen girls" in the name of the group chat that he  
9 was -- that he had entered into.

10 The possession of photos or memes involving incest,  
11 inbreeding, and dad-and-daughter sex. There were countless  
12 images on the defendant's phones that were essentially gifts or  
13 memes where it's a photograph and then it has a tag line on it  
14 describing, you know, some statement or act; all that involved  
15 incest, inbreeding, dad-and-daughter sex. Again, there were  
16 hundreds of these, but we would select maybe three or four to  
17 produce for the jury.

18 THE COURT: Three or four what exactly?

19 MR. SCHILLER: Images.

20 THE COURT: Images of the memes?

21 MR. SCHILLER: Yes. The memes themselves are images.

22 THE COURT: Okay. So this, sort of, miscellaneous  
23 third category, I think you started off saying "evidence of him  
24 in chat rooms regarding teen girls." How would that  
25 materialize? Are those pictures too? Or --

1 MR. SCHILLER: It is an extraction from his phone  
2 showing a date and time that he entered a particular chat room  
3 and the name of the chat room. And all of that occurs in late  
4 2023.

5 THE COURT: Okay. And then the memes or images you  
6 said -- your proposal would be how many of those?

7 MR. SCHILLER: I have my list. Hold on one second,  
8 Judge.

9 I have identified five out of the hundreds and hundreds  
10 that exist.

11 THE COURT: Can you give me an example of what one of  
12 these memes says -- or shows?

13 MR. SCHILLER: Sure.

14 One of them might show an adult male engaging in sex  
15 with what appears to be a young girl, age unknown, and the tag  
16 line would say something like "love impregnating my daughter."

17 THE COURT: Okay. What else is in this third bucket?

18 MR. SCHILLER: The last part would be -- we found a  
19 particular photo of a naked teen girl, and the words on the  
20 photo say "are you a pedophile?" with a question mark. "Our  
21 survey says yes." Those words are printed on the photo of what  
22 appears to be a young, naked teen girl. I siphoned that one  
23 out separately.

24 THE COURT: And all of this content you are saying  
25 comes from either the cracked-screen phone found in the car or

1 the second phone found in his house?

2 MR. SCHILLER: Correct.

3 THE COURT: And when you say these memes or this  
4 picture of the naked teen girl, is that just in the photo  
5 library or where in the phone?

6 MR. SCHILLER: Can I just have one second, Judge?

7 THE COURT: Yes.

8 MR. SCHILLER: We found them in several places within  
9 the phone; sometimes in the photo library, sometimes  
10 in -- within apps that he was using specifically, but  
11 definitely in places he had access to.

12 THE COURT: Okay. The app that was used to communicate  
13 with the undercover here, is that Kik?

14 MR. SCHILLER: Yes, ma'am.

15 THE COURT: And then -- because you mentioned other  
16 applications that he used --

17 MR. SCHILLER: Yes.

18 THE COURT: -- in the -- in the second category of  
19 information. What other apps are in that one?

20 MR. SCHILLER: Telegram.

21 THE COURT: Okay. So now you've, sort of, given me the  
22 universe of stuff, at least to the best of your definition at  
23 this point. Now, can you argue why it should come in?

24 MR. SCHILLER: Sure. There is one other bucket of  
25 stuff, though.

1 THE COURT: Okay.

2 MR. SCHILLER: I told you about the phones. But then  
3 also from the three Google accounts that belong to the  
4 defendant, we found in there a substantial amount of child  
5 pornography. And we found a lot of the images and videos that  
6 he sent to the undercover agent in those accounts and some  
7 other stuff -- other -- excuse me -- other child pornography as  
8 well. So that's that final bucket.

9 THE COURT: What is the time period for the Google  
10 accounts?

11 MR. SCHILLER: The images and videos we're considering  
12 are all within the fall, leading up to December of -- I will  
13 say the second half of 2023. So it's all within a relative  
14 time frame or the time frame of the charged indictment.

15 THE COURT: Because when were the warrants on Google  
16 served and then produced?

17 MR. SCHILLER: After his arrest, they were  
18 produced -- they were sought. Google responded, I believe,  
19 January of this year, maybe February. We've --

20 THE COURT: And you were asking to go how far back?

21 MR. SCHILLER: I don't remember, Judge. I'm sorry. I  
22 don't --

23 THE COURT: Okay. Well, that's -- my question is, just  
24 in terms of the time period for the Google account return, are  
25 we talking about just fall of 2023 content or going back years?

1 MR. SCHILLER: It goes back years. But we're going  
2 to -- the information we're going to seek to produce to the  
3 jury will be within 2023. So it will be in the year of the  
4 crime. I have no problem limiting myself to that for the  
5 Court.

6 THE COURT: And in terms of the Google accounts, this  
7 is actual images of child pornography? What kinds of material?

8 MR. SCHILLER: Yes, images and video of child  
9 pornography and -- yeah, we've -- so that's the illegal  
10 material. The accounts also include images of the defendant.  
11 Those aren't bad acts. Those are just to show his ownership  
12 over it; so we would, you know, probably move those in, but not  
13 for other bad acts, just to show ownership over those accounts.

14 Those email accounts were connected to the Kik account  
15 that he was using to communicate with the undercover agent in  
16 this case as well. So it's all connected together. But the  
17 motion specifically talks about the other bad acts that  
18 otherwise have not been charged as crimes, even though they  
19 are.

20 THE COURT: Okay. Any other items of evidence?

21 MR. SCHILLER: No. That covers everything, Your Honor.

22 THE COURT: Okay. So now we can run through your  
23 analysis.

24 MR. SCHILLER: Okay. Thank you, ma'am. Can I approach  
25 the podium, if that's --



1 THE COURT: Yes.

2 MR. SCHILLER: Okay. Thank you.

3 Judge, in my motion in limine I tried to break down for  
4 the Court not only the items being sought -- sought to be  
5 admitted that I have just described, but then referencing those  
6 subheadings in my arguments so Your Honor can relate back as  
7 you're reviewing it. So just, for example -- and then I will  
8 get to my argument -- but it will make more sense this way.

9 The section -- the section that I just went over with  
10 the Court explaining the bad acts that we found from his phone,  
11 the child pornography and whatnot, within the motion it's  
12 within heading (I) (B) (2). And then if you notice on page 7  
13 where I start discussing the admissibility of this inextricably  
14 intertwined, I reference it as section (I) (B) (2). So this way,  
15 as Your Honor is reviewing the motion in limine, within and  
16 after today's hearing, it's easy to go back to the items I want  
17 to admit and see exactly what we're referring to.

18 So for purposes of the inextricably intertwined  
19 argument, for evidence to be considered inextricably  
20 intertwined, it has to be "uncharged offense that arose out of  
21 the same transaction or series of transactions as charged  
22 offenses, necessary to complete the story of the crime, or" --  
23 not "and," but "or" -- "inextricably intertwined with the  
24 evidence regarding the charged offense." And that's citing  
25 *United States v. Troya*, 733 F.3d 1125, the Eleventh Circuit,

1 2003.

2 We find that that exists with two pieces of the  
3 government's evidence as inextricably intertwined; and that is  
4 the child pornography that we uncovered from his phones and  
5 from the Google accounts.

6 Why are they inextricably intertwined and should be  
7 admitted under that theory? Well, as an initial matter, the  
8 evidence overlaps temporally with the charged conduct. So the  
9 child pornography that we found is around the same time as his  
10 distribution of child pornography in this case.

11 The uncharged possession of child pornography arose out  
12 of the same series of transactions as the charged offenses and  
13 is inextricably intertwined because -- well, let me -- sorry.  
14 Let me strike that for a second and approach it a different  
15 way.

16 The images and videos of child pornography found on the  
17 defendant's phones and his Google accounts are necessary to  
18 explain the context, motive, and setup of the crime. Because,  
19 for the defendant to distribute child pornography, he had to  
20 possess it first. So what we're showing the jury is how he  
21 possessed it.

22 Now, if he was here in the Southern District of Florida  
23 when he committed these crimes, we could charge him with that  
24 material because we would have venue over it. But he had it in  
25 the Southern District of California where he was arrested. So

1 we can't charge him with possession of it here. We can charge  
2 him with distribution with the agent. But the items that he  
3 possessed are part and parcel with how he had them to then  
4 distribute them. So that's one way that we believe it is  
5 inextricably intertwined.

6 And simply put, Douglas possessed child pornography in  
7 relation to and in furtherance of his distribution of child  
8 pornography.

9 So it's not a complex argument I'm trying to make. I  
10 just -- it's because he had it that he was able to distribute  
11 it.

12 THE COURT: All right. But that would only get you the  
13 images that are the same ones he transmitted.

14 MR. SCHILLER: I think -- I don't think it's limited to  
15 that because he chose of his collection what to distribute to  
16 the agent, and he did choose certain ones to distribute. And  
17 he could have chosen from any of the items that he had on his  
18 phones and his Google accounts. So I think it's the possession  
19 of those materials that he possessed to, then, choose from to  
20 distribute is what's inextricably intertwined.

21 Now, again, we're not going to look to show the jury --  
22 I mean, he had thousands of images and videos of child  
23 pornography across his two phones and his Google accounts.  
24 We're going to pick a select few that we found, but also that  
25 he, in fact, did distribute to the agent that we did find on

1 his phones and his Google accounts. So it -- it's both,  
2 really.

3 But I think that whether the Court finds that it's  
4 inextricably intertwined or not, I think the Court will  
5 certainly see that it, at the very least, falls under 404(b)  
6 evidence or certainly 414 evidence.

7 So if the Court has no other questions, I will move on  
8 to those areas as well.

9 THE COURT: In terms of just volume, you said thousands  
10 of images.

11 MR. SCHILLER: Yes. And videos.

12 THE COURT: And that's across the spectrum of both  
13 phones, plus Google accounts.

14 MR. SCHILLER: Exactly.

15 THE COURT: Okay. When you say "thousands," are we  
16 talking about 10,000?

17 MR. SCHILLER: No. No, we're not. We're talking  
18 about, I believe, around 2,000 on one device, several hundred  
19 on another device, and several hundred across the Google  
20 accounts.

21 THE COURT: And some of the images in each of those  
22 repositories match up with the images that were distributed?

23 MR. SCHILLER: Yes, ma'am.

24 THE COURT: Okay. So now you can move on to 414.

25 MR. SCHILLER: Thank you very much.

1           So Federal Rule of Evidence 414 is a very, very unique  
2 rule and one that is typically rare for Courts to see and  
3 prosecutors to attempt to use because it's rare that we have a  
4 defendant with a previous conviction or one who has previously  
5 done similar things to what they're doing now.

6           Federal Rule of Evidence 414 provides that in a  
7 criminal case in which the defendant is accused of child  
8 molestation, the Court may admit evidence that the defendant  
9 committed any other molestation to be considered on any matter  
10 to which it is relevant, including propensity.

11           This is much, much broader than 404(b) evidence that I  
12 will get to in a few minutes. So the statute plainly defines  
13 all of this. It says child molestation means a crime under  
14 federal law or under state law involving -- and then it lists  
15 several things -- any conduct prohibited by 18 U.S.C.  
16 Chapter 110. So that means any previous act, and where the  
17 current act and the previous act are both chargeable under  
18 Title 18, United States Code, Section 110, that's child  
19 molestation. Well, that includes 18 U.S.C. 2252(A) which is  
20 what the defendant is charged with here, including distribution  
21 of child pornography. It counts as a child molestation  
22 offense. That was a broad term the legislature chose to  
23 create, but then defined it specifically.

24           What I did not mention in my motion, and I -- and I  
25 neglected to do this, and I apologize to the Court, but that it

1 also includes contact between the defendant's body and the  
2 child's genitals or anus, or the defendant's genitals or anus  
3 and the child's body, or an attempt to do so. And so his act  
4 of enticement of a minor in this case is, in fact, that attempt  
5 to do that act. And his previous conviction, as I have  
6 outlined in my motion, was his attempt to do that as well.

7 So because both the previous conviction for  
8 distribution of child pornography, possession of child  
9 pornography, and his attempted solicitation all fall under the  
10 414 definition of child molestation, and so do his current  
11 charges, the evidence then is considered 414 evidence and so is  
12 the other child pornography he possessed. It is, by  
13 definition, admissible for propensity evidence. And it's  
14 important because -- and I will get to this also in the 404(b)  
15 argument. But one of the things I'm under the impression that  
16 the defense may lodge as a defense is that -- and excuse my  
17 colloquy, but "some other dude did it." It wasn't him. It was  
18 someone else who was behind the phone during the distribution  
19 or some kind of chatting, but it wasn't him.

20 And so to that end, he actually made that exact same  
21 argument in his trial back in 2011. So that's another reason  
22 why we would be seeking to admit it. But under 414, we could  
23 admit -- once that evidence is admitted, if the Court grants  
24 it, the government can argue that evidence for propensity. He  
25 did it once, he is still doing it now. And the law was created

1 that way specifically because -- and I'm -- I will quote from  
2 the legislature when they wrote the law. On page 10 of my  
3 motion it says "the practical effect of the new rules is to put  
4 evidence of uncharged offenses and sexual assault and child  
5 molestation cases on the same footing as other types of  
6 relevant evidence that are not subject to a special  
7 exclusionary rule. The presumption is in favor of admission.  
8 The underlying legislative judgment is that the evidence  
9 admissible pursuant to the proposed rules is typically relevant  
10 and probative, and that its probative value is normally not  
11 outweighed by the risk of prejudice or other averse effects."

12           Early -- a little bit earlier on the page, on page 10  
13 of my motion, I wrote that, "In contrast to Rule 404(b)" --  
14 which I will get to in just a minute, the -- "which generally  
15 prohibits character and propensity evidence, 414 authorizes  
16 admission and consideration of evidence of an uncharged  
17 offense" -- in this case some of it is charged, four were  
18 previously charged -- "for its bearing on any matter to which  
19 it's relevant. This includes the defendant's propensity to  
20 commit sexual assault or child molestation offenses and the  
21 assessment of -- the probability or improbability that the  
22 defendant has been falsely or mistakenly accused in such an  
23 offense." So we can use it for that exact purpose.

24           So, in my motion I cited to several Eleventh Circuit  
25 cases upholding this exact proposition that the government is

1 offering. I offered on page 11, *United States v. Baker*,  
2 680 Fed.App'x 861, an Eleventh Circuit case from 2017, where  
3 the Court affirmed the admission under Rule 414 of a prior  
4 conviction for child molestation and a possession of child  
5 pornography case. So in that --

6 THE COURT: Was that just the conviction itself or was  
7 it the underlying details?

8 MR. SCHILLER: Details.

9 In *United States v. Levinson*, which actually took place  
10 in the Southern District of Florida, 504 Fed.App'x 824,  
11 Eleventh Circuit, 2013, the Court held that, "Finding evidence  
12 that the defendant engaged in child molestation properly was  
13 admitted under 414 to prove he had a, quote, 'disposition of  
14 character' that makes it more likely that he committed the  
15 charged act of child molestation."

16 THE COURT: Okay. I under the authorities that you  
17 have cited.

18 So you're certain that the Baker case involved a  
19 situation in which the government, for example, called a  
20 witness to talk about the exact evidence of the prior crime,  
21 rather than just admitting the judgment itself?

22 MR. SCHILLER: I said yes before. I'm pretty sure  
23 that's the case. But you know what, Judge? I -- I am not  
24 100 percent. I apologize. No.

25 THE COURT: We will check that.



1 MR. SCHILLER: Okay.

2 THE COURT: Okay. And so 414, your point is it's very  
3 broad, it permits propensity evidence, and that all of the  
4 evidence you're seeking to admit falls under the definition.

5 Anything further on 414?

6 MR. SCHILLER: No, ma'am. The only thing -- the only  
7 part of the government's evidence it's seeking to admit that  
8 doesn't fall under the 414 is that smaller bucket of the memes  
9 and the teen chat room and those particular things because I  
10 don't think they fall under the definition of child  
11 molestation. Everything else, I believe, does.

12 So, finally, if I may move on to the 404(b) argument.

13 THE COURT: Yes.

14 MR. SCHILLER: As this Court is well aware, 404(b)  
15 evidence is admissible to prove motive, intent, plan,  
16 knowledge, or the lack of mistake or accident. And for 404(b)  
17 evidence to be admitted, the government has to show that one of  
18 those issues is an issue in the case other than to show the  
19 defendant's bad character; to be supported by sufficient  
20 evidence that allows the jury to determine that the defendant  
21 committed the acts; and is not unduly prejudicial. And, again,  
22 I will deal with the third part at the end of my arguments.

23 So the evidence is being offered for a proper purpose.  
24 It's being offered to show his motive, his intent, his purpose,  
25 and his lack or mistake of accident to commit these crimes in

1 distributing child pornography to the undercover agent and  
2 attempting to solicit her notional child. The evidence tends  
3 to prove that it was the defendant and not anyone else who  
4 engaged in the charged conduct of distributing child  
5 pornography and attempting to entice a minor. Indeed, the  
6 defendant in this case, like I said before, is likely to assert  
7 that either he didn't knowingly or intentionally engage in the  
8 conduct, that he was not the person that communicated with the  
9 UC, some combination thereof, and is needed to prove that the  
10 defendant had the knowledge and intent to commit these crimes  
11 because of what he has done in the past.

12           Again, I'm not going to cite -- I know the Court knows  
13 the case law, but when a defendant pleads not guilty, he is  
14 placing these things that arise out of 404(b), motive, intent,  
15 opportunity, lack of mistake, at issue the moment he pleads not  
16 guilty. And, absent an affirmative removal of intent and  
17 motive, identity, lack of mistake, as issues in the case, the  
18 government is entitled to introduce the evidence to establish  
19 the facts without having to wait for the defendant to put those  
20 matters at issue.

21           Just a couple of cases I wanted to bring to the Court's  
22 attention. I already mentioned the *Levinson* case because there  
23 was 414 evidence in there. Well, the Court also made a 404(b)  
24 finding and it "affirmed the admission of the defendant's  
25 possession of real and virtual child pornography as evidence of

1 the defendant's purpose and intent in coercing a minor to  
2 engage in sexual activity."

3 Because of his chats with an undercover agent in that  
4 case, what they found on his computer regarding child  
5 pornography was admissible as 404(b) evidence.

6 Interestingly, though, the defendant seems to, in  
7 his -- well, he filed a -- a motion to prevent this information  
8 from coming in, in advance of my omnibus motion, and then filed  
9 a response. But what he said in the motion was the government  
10 can make its case without such additional extrinsic evidence.  
11 The Fairness Doctrine dictates this type of evidence should not  
12 be allowed in trial.

13 I don't see anywhere in the defendant's arguments that  
14 they don't think the evidence that I'm offering is either  
15 inextricably intertwined or 404(b) or 414 evidence. I think  
16 the argument they're making is a 403 argument; that it is more  
17 prejudicial than probative. And I think that's where they're  
18 resting their decision or their arguments. And, again, I will  
19 get to that in just a second.

20 As far as the evidence itself, because as I said, there  
21 is -- the government has to show that it was the defendant who  
22 did these prior bad acts. The prior conviction and the  
23 evidence of that will take the place -- will take the form of  
24 one or two witnesses who will testify briefly as to what  
25 occurred back in 2006, resulting in his 2011 conviction.

1           And then with -- regarding what we found on the two  
2 phones and the Google accounts, there will be one witness, the  
3 digital forensic examiner, Scott Unger from HSI, who we  
4 provided notice of expertise about in separate filings, who  
5 will testify to what he uncovered on the defendant's devices  
6 and in the Google accounts. So we are talking a matter of  
7 three witnesses. And time-wise, it will be a very, very small  
8 part of the trial compared to what the jury's going to hear in  
9 the form of these chats that took place between the defendant  
10 and the undercover agent.

11           And I have to caution the Court because these chats are  
12 nothing short of sadistic and masochistic. They are gruesome  
13 in their description of what the defendant wants to do to the  
14 notional 8-year-old child. And his plan to do so, first in  
15 Florida, and then eventually allowing them to come to  
16 California and do it there, up until the day of his arrest.

17           So that is going to be overwhelming evidence for the  
18 jury to hear; I don't mean as far as guilt or not guilt. I'm  
19 just saying it's overwhelming to hear.

20           The other stuff that the government wants to introduce  
21 as either inextricably intertwined, 404(b) or 414, pales in  
22 comparison to the actual charged crime. So when we talk about  
23 a 404 -- 3 analysis, I want the Court to understand that's  
24 where the government is coming from.

25           I cited a few cases that are similar to this case in my

1 motion. And specifically at docket entry 62, page 17, I cited  
2 to *United States v. Cooper*, 433 Fed.App'x 875, the  
3 Eleventh Circuit from 2011. And there the Court held that,  
4 finding under Rule 403, evidence of the defendant's prior  
5 conviction of child molestation were highly probative because  
6 it tended to show that Cooper, the defendant, intentionally  
7 downloaded child pornography, that he knew the images were  
8 child pornography, and that he had not mistaken them for  
9 anything other than that.

10 And so, yes, the evidence is prejudicial because it is  
11 grotesque, but so is what he is charged with. And so I think  
12 what the defense is going -- has already argued in their  
13 motions, and they do so today, is that the 403 analysis somehow  
14 creates an unduly prejudicial situation with the other bad acts  
15 the government wants to introduce. So that's just not the  
16 case. It is small in comparison to what the government will  
17 present in this case involving his 6- to 7-week-long chats with  
18 an undercover agent, his distribution of child pornography, his  
19 plan to meet up with the agent, the day in question when he is  
20 finally taken down and arrested and having a grenade to protect  
21 himself or hurt others so he won't be arrested or whatever he  
22 thinks is going on, his interview with the agents, and then  
23 what we ended up finding on his devices even relevant to the  
24 charges in this case. That will be the overwhelming  
25 presentation of evidence. The other bad acts, as I have

1 outlined them, will be a small portion.

2 I'm not going to go through them all, but 19 through 20  
3 of my motion, I listed Eleventh Circuit case after  
4 Eleventh Circuit case -- Second's, Eighth's, and Tenth Circuit  
5 cases, that in these exact circumstances, tell the Court that  
6 the 403 analysis does not prevent the introduction of the  
7 evidence.

8 And just by way of one example, I cited to  
9 *U.S. v. Carino*, 368 Fed.App'x 929, out of the Eleventh Circuit  
10 from 2010. And there the Court approved the use of the  
11 defendant's sister testifying that the defendant sexually  
12 abused her when he was 16 years old, but was facing trial now  
13 32 years later with possessing and receiving child pornography.

14 I look at that case and I go, so he's charged with  
15 possessing images and distributing images and videos of child  
16 pornography. And the other bad act evidence that comes in is  
17 his actual physical molestation of his sister. And the  
18 Eleventh Circuit upheld that. We are a far cry from that in  
19 this case with the evidence that the government wants to admit.

20 But the other reason I brought that case up and the  
21 lineage of cases that follow is because one of the arguments  
22 that defense makes is that the prior conviction evidence --  
23 which, convicted in 2011, occurred in 2006 -- is way too remote  
24 in time and fails the 404 -- 3 test. There is case after case  
25 allowing similar evidence even farther dated back than that to

1 be admitted at trial. 414 and 404(b) do not have time  
2 limitations on them. There are some rules of evidence, like  
3 609, that do, but not 404(b) and not 414.

4 THE COURT: All right. Well, just because the  
5 Eleventh Circuit has authorized or affirmed a District Court's  
6 exercise of discretion in one direction does not mean that that  
7 is, sort of, the one and only way to address evidentiary  
8 disputes. And so, I guess, my question is, given the  
9 overwhelming weight of evidence, as you've described it, of the  
10 charged offenses, why is it necessary, for example, focusing  
11 just on the 2011 conviction, to go into the underlying details  
12 of that crime?

13 MR. SCHILLER: Sure, Judge.

14 Because the defendant's going to argue that he didn't  
15 do this.

16 THE COURT: But we don't know that yet.

17 MR. SCHILLER: Well --

18 THE COURT: Why not just table this discussion until we  
19 know what the defense actually is?

20 MR. SCHILLER: So because then what would happen is --  
21 and I have seen this happen in trial before -- where I don't  
22 lodge the argument as 414 or 404(b), and then in closing  
23 argument a defense attorney stands up and says, "Ladies and  
24 gentlemen, nobody can put my client behind the keyboard or  
25 behind the phone at the moment he did this because nobody was

1     there seeing him."

2             The defendant in his interview to the police already  
3     told them and blamed this on some other guy named Adrienne who  
4     was squatting at his home. Adrienne was there the day the  
5     search warrant was executed. I can't predict what the defense  
6     is going to argue on cross or on -- or on their case in chief.  
7     But if I don't present the evidence, there is nothing stopping  
8     them from arguing in closing: Someone else did this. We don't  
9     know who. Maybe it was the guy living in the house. Maybe it  
10    was his mother. Who knows? But the government can't prove at  
11    that moment in time it was him.

12            So that's why this other bad act evidence goes to  
13    attack that argument. If I wait -- if we wait until closings,  
14    the case has been closed and I can't reopen it. So I think  
15    what the Eleventh Circuit and other courts around the country  
16    have said is it's admissible for -- especially under 414 -- to  
17    show propensity. That's allowed. And the legislature, in  
18    creating that law, was trying to give the courts a mechanism  
19    whereby it could admit that because it was relevant. Because  
20    jurors should be able to consider that when deciding the case  
21    that's charged before them.

22            THE COURT: Just so I understand, the only evidence  
23    that you are saying that, in your view, does not fall into 414  
24    territory are the five memes that you are going to select?

25            MR. SCHILLER: Sorry, Judge. I want to answer you



1 without hesitation. That's one of them, yes, ma'am.

2 THE COURT: That's it? Everything else, in your view,  
3 satisfies the definition of child molestation?

4 MR. SCHILLER: So on page 5 of my motion at Section 2,  
5 line items C, D, and E, those things -- those three things that  
6 fall within that smaller bucket I do not believe qualify under  
7 414. But everything else that we're seeking to admit -- the  
8 facts of his prior conviction, his distribution and possession  
9 of child pornography in other instances, all fall under 414,  
10 yes, ma'am.

11 THE COURT: Okay.

12 MR. SCHILLER: And, again, I want to -- I want to offer  
13 the Court -- we found so much of this evidence, but we are  
14 going to limit it to a very, very small sampling. Just so the  
15 jury understands, that we found an amount of this material,  
16 here is one example. And that's --

17 THE COURT: Right. But you still want to introduce  
18 into evidence that there -- presumably through the forensic  
19 examiner, that thousands of images of child pornography was  
20 found in total; correct?

21 MR. SCHILLER: Sure. And I don't think that's an  
22 unfair thing to ask because we're giving the jury the  
23 understanding of what his collection was like for the purposes  
24 of distributing, as inextricably intertwined, and because it  
25 shows his intent and motive and opportunity to commit this

1 crime.

2 If he had but a few and distributed those but a few, he  
3 could make the argument, "Well, I didn't put those on there and  
4 I don't know how they got distributed." But when you have  
5 thousands on there, it's very difficult to make that argument.

6 THE COURT: Other than your initial argument that -- on  
7 the inextricably intertwined, that in order for him to have  
8 distributed, he would have necessarily had to possess some.  
9 And so, at least for the images that he distributed, those  
10 would fall under that inextricably intertwined doctrine. Do  
11 you have any other arguments to support admission under  
12 inextricably intertwined?

13 MR. SCHILLER: Nothing outside of my motion and what I  
14 made today, Your Honor.

15 THE COURT: But in your motion, what else do you say  
16 with respect to inextricably intertwined? Like, why is all  
17 this other stuff necessary to complete the story of the crime,  
18 for example?

19 MR. SCHILLER: So -- and forgive me if I mentioned  
20 these already. But the evidence tends to corroborate, explain  
21 or provide necessary context for evidence regarding the charged  
22 offenses of distributing child pornography. It's necessary to  
23 explain the context and motive and setup of the crime. It is  
24 necessary to show the defendant's prurient interest, as  
25 evidenced by his collection of child pornography, as part of

1 the story of the case; and the logical and coherent explanation  
2 of how the defendant successfully distributed child pornography  
3 to the undercover agent necessarily requires an explanation of  
4 what he was distributing and how much he had to distribute in  
5 the first place.

6 THE COURT: Okay. All right. Thank you.

7 Let me hear from Mr. Kirby.

8 MR. SCHILLER: Oh, Judge, I'm sorry.

9 THE COURT: Yes.

10 MR. SCHILLER: The defense made two other arguments in  
11 their response to my motion in limine that I responded to per  
12 the Court's order, and I just wanted to address those facts.

13 THE COURT: Okay. Quickly.

14 MR. SCHILLER: Okay. Thank you.

15 At docket entry 67 I responded to the defendant's other  
16 arguments that he made regarding the -- his dislike of  
17 admitting the facts of the prior underlying case. He made an  
18 argument regarding the age of the child. In our case the age  
19 of the child was 8. And in the 2011 conviction, the underlying  
20 age of the child was a teenager. And he said, well, those two  
21 aren't the same, so it shouldn't be admitted.

22 The reason his argument fails is because the age of the  
23 child beyond the defendant's belief that it was a child, i.e.,  
24 under the age of 18, is not an element of the crime. So it's  
25 irrelevant how old the child actually is. The crime punishes

1 that it's a child. It doesn't matter whether she's 6, 12, or  
2 17; the crime punishes the fact that she was a child. And this  
3 only goes towards the enticement count in Count 8 of the  
4 indictment. They're not making that argument as to the child  
5 pornography distribution charges.

6 They also made a second argument that the defendant's  
7 intent of whether he was actually going to meet this pretend  
8 child in 2006 was the same as it was here. And, again, it's  
9 really irrelevant because whether he was -- I'm sorry -- not  
10 whether his intent was to meet the child, but whether he was  
11 actually going to meet the child. Because the actual meeting  
12 of the child or showing up to the hotel is not an element of  
13 the crime at all. It might be part of the substantial step  
14 taken, but it's not physically needed as an element of the  
15 crime.

16 And, finally, it's interesting. The defendant makes no  
17 argument to exclude his prior convictions for distribution and  
18 possession of child pornography other than remoteness. So in  
19 their trying to keep out the facts of the prior conviction,  
20 their arguments seem to be mostly on the solicitation count.  
21 And their arguments to keep out the fact that he previously  
22 possessed and distributed child pornography are about  
23 remoteness in time about when it happened, 2006 versus 2023.

24 Thank you.

25 THE COURT: Okay. Just so I understand the paperwork

1 for the prior conviction, I think you attached, at 59-1, some  
2 documents from the Superior Court of California.

3 MR. SCHILLER: Yes, ma'am.

4 THE COURT: So I'm trying to understand exactly what  
5 would be shown to the jury. Is it that four-page document? Or  
6 does it then go on -- I see a minute entry pronouncement of  
7 judgment sheet.

8 MR. SCHILLER: What I think is necessary is the -- the  
9 felony complaint that lists the four charges and then the  
10 docket entry showing the conviction of those four charges.  
11 Because the docket entry --

12 THE COURT: Working with what I have in front of me  
13 unless you have something else --

14 MR. SCHILLER: Sorry, ma'am.

15 THE COURT: I'm looking at 59-1.

16 MR. SCHILLER: Yes, ma'am.

17 THE COURT: It says DNA test status summary.

18 MR. SCHILLER: Yes.

19 THE COURT: And it says charged summary. Is that what  
20 you are talking about?

21 MR. SCHILLER: I am. So page 1, 2, 3, and 4 of that  
22 docket entry.

23 THE COURT: That's just the information summary?

24 MR. SCHILLER: It's the charges. It's the actual filed  
25 charges against the defendant.

1 THE COURT: And then where is the actual conviction?

2 MR. SCHILLER: So that exists in a docket entry at  
3 59-1, page 6.

4 THE COURT: Okay. Now, in terms of the witness that  
5 you have lined up to testify about the facts underlying that  
6 prior conviction, who is that?

7 MR. SCHILLER: So we have the -- two witnesses. We  
8 have the undercover agent from Texas who was actually chatting  
9 with the defendant back in 2006. And we have the lead  
10 investigator who executed the search warrants and performed the  
11 investigation in San Diego where the defendant was eventually  
12 arrested.

13 So what happened was, these two agents were actually  
14 working a case simultaneously and they were able to identify  
15 each other as having -- they were investigating the same  
16 defendant, Michael Douglas. And so the Texas agent basically  
17 turned over his undercover chat case to the San Diego agent,  
18 and then San Diego made the arrest, including those charges.  
19 The case went to trial and was upheld on appeal.

20 We are working to try to get the transcripts of those  
21 trials -- of that trial if they still exist and trying to  
22 identify the court reporter.

23 THE COURT: Okay.

24 MR. SCHILLER: So --

25 THE COURT: All right. Thank you.

1 MR. SCHILLER: Thank you, ma'am.

2 THE COURT: Mr. Kirby.

3 MR. KIRBY: Yes, Your Honor.

4 Your Honor, as an initial matter, as to the  
5 inextricably intertwined argument, I think Your Honor is  
6 correct. I mean, I think what that goes to is the -- the  
7 images that were actually sent to the minor. I don't have  
8 any -- any -- or the notional minor. I don't have an argument  
9 as to those.

10 As to the other images, I think that really does come  
11 in under other act evidence, and it goes too far afield. I  
12 mean, I -- I have -- I think we could maybe split things down a  
13 little bit, but when we're talking about images of  
14 daddy-and-daughter sex, that has nothing to do with this case.  
15 Or talking about teenage girls; that has nothing to do with  
16 this case. I think the government is trying to prove too much.  
17 They have their case. They have the evidence that pertains to  
18 this case. And to bring in all of these other images is just  
19 inviting error, and -- and it's -- it's swallowing the facts of  
20 the case itself. I think the government should be limited to  
21 the images that were sent to the minor -- to the notional  
22 minor.

23 And as far as the conviction -- the prior conviction,  
24 404(b), I think it's good they have 414 because, really, it's  
25 nothing but propensity evidence. It doesn't go for anything

1     aside from that. And it is 13 years old, Your Honor, which,  
2     granted, there have been cases where certainly older  
3     convictions or acts related to older convictions have come in.  
4     But in a vacuum and given the rest of the evidence the  
5     government has, it's unnecessary and it's excessive and  
6     it's -- it's remote and it shouldn't -- it shouldn't come in.

7             The government's now saying it's two witnesses. In  
8     their motion in limine they said three to four witnesses.  
9     You know, they're witnesses maybe we would want to call. And  
10    then we have a trial within a trial of the 404(b) prior act,  
11    which is going to take us far afield of what this case is  
12    actually about.

13            I would ask that Your Honor not allow the 2011  
14    conviction or the facts underlying it to come in, and that the  
15    pornography that we're discussing -- and there is plenty of it  
16    that was sent to this notional child -- that the government be  
17    limited to that pornography.

18            THE COURT: So is your argument just one rooted in 403,  
19    ultimately?

20            MR. KIRBY: Not as to 404 -- not as to the 404(b) part  
21    of the argument. I think it is propensity evidence, and I  
22    don't think it's permissible under 404(b).

23            As to 414, yes, it's a 403 argument, Your Honor. I  
24    think, given the -- the facts underlying the conviction as to  
25    the prior 2011 conviction, yes. As far as all of these other



1 thousands of images -- and, again, there has been no -- okay,  
2 so we have five memes, but other than that, we have thousands  
3 of images. I'm not sure what the government is even seeking to  
4 introduce at this point, quite frankly.

5 THE COURT: So you would agree, at least so far, that  
6 other than the memes, everything they've described in terms of  
7 images of child pornography found on the phone or in the Google  
8 accounts, that those would meet the definition of child  
9 molestation under 414?

10 MR. KIRBY: Not necessarily, Your Honor, because I  
11 don't know what they're seeking to -- to introduce. I mean,  
12 we're talking about thousands of images. For them to just say  
13 they all meet it, I mean, I think it's -- the burden should be  
14 upon them to categorize the images and say these are the  
15 images, not just all of them.

16 You know, I mean, I can, I suppose, dig through 10,000  
17 images and make an argument image by image, but I think that  
18 should -- the government is seeking to introduce them. I think  
19 the burden should be on them to -- to determine "these are the  
20 images we want to put in, this is why they meet that  
21 definition," rather than just say all of them do. I mean, I  
22 don't know what "all of them" means.

23 THE COURT: Well, in the motion they itemized the  
24 categories of what they found, for example, on his phones. And  
25 they have broken it out between possession of child

1 pornography, some of which is the same as what he distributed  
2 allegedly to the undercover in this case. And you have  
3 distribution and receipt of child pornography. I mean, is it  
4 your argument that it isn't actually child pornography?

5 MR. KIRBY: No. My argument is that rather than  
6 just -- just painting a broad brush, that the government needs  
7 to set forth the images it seeks to introduce rather than just  
8 state that it's going to introduce some subset of these images  
9 and leave it upon me to make individual arguments as to  
10 individual images that I don't even have. I don't even know  
11 which ones they're talking about yet.

12 THE COURT: Okay. Well, it sounds like generally what  
13 I have heard is a 403 argument, and then an argument, I guess,  
14 about further particularization of the particular evidence.

15 Anything further in response to the government's motion  
16 in limine?

17 MR. KIRBY: No, Your Honor.

18 THE COURT: Okay. All right. Well, on the suppression  
19 issues I'm going to reserve ruling pending September 2nd, which  
20 is the date, as I said, by which the defense can file a motion  
21 to reopen on the limited consent issue.

22 I'm going to ask the government to file on the docket  
23 the exhibits that were introduced today. And if they cannot be  
24 filed because they're audio recordings, then file them  
25 appropriately with the clerk of court.

1           As far as the passport, that should be the subject of a  
2 motion to seal, and then any redactions to be discussed between  
3 the parties, and then filed on the docket after agreement with  
4 respect to any PII.

5           Any questions just about the housekeeping submission of  
6 evidence?

7           MR. SCHILLER: Judge, I just have one. Regarding the  
8 motion to seal the passport, I just want to make sure I  
9 understand the Court correctly. You want me to file a motion  
10 requesting permission to seal it? Or just, generally speaking,  
11 based on the Court's ruling here today?

12          THE COURT: Yes.

13          MR. SCHILLER: Okay. I understand. Thank you.

14          THE COURT: Okay. There were no defense exhibits  
15 submitted during this hearing. Is that correct, Mr. Kirby?

16          MR. KIRBY: That is correct, Your Honor.

17          THE COURT: Okay. So I will take those motions to  
18 suppress under advisement, as I said, pending receipt of that  
19 eventual motion to reopen, if one is filed. Again, reminding  
20 Mr. Kirby of the expert notice rules.

21               With respect to the motion in limine, I do think it is  
22 a bit too early to rule definitively on those issues. As a  
23 general matter, I think the government presents very compelling  
24 arguments for admission under the various rules that are cited,  
25 but it's too early to make those final calls without really

1 seeing the evidence in more granular detail.

2 What I can generally say at this point, at least with  
3 respect to the 2011 conviction, is that -- is that it's unclear  
4 to me why particular evidence about that prior conviction in  
5 the form of witness testimony is necessary beyond the fact of  
6 conviction and the certified paperwork.

7 So I'm inclined not to permit discussion of the  
8 underlying details of the prior conviction because I think  
9 under 403 the balancing ultimately tips in favor of defense on  
10 that issue.

11 But with respect to all of the additional evidence that  
12 was described found on the phone and in the Google accounts, I  
13 think it's likely that much of that does warrant admission.  
14 But, again, those decisions need to be made closer to trial.

15 So I'm not going to issue any final rulings except for  
16 what has been agreed to definitively. And so I will  
17 memorialize something to that effect, but no final ruling on  
18 the in limine motion will be made at this time.

19 Any questions before we adjourn?

20 MR. KIRBY: No questions, Your Honor. There  
21 is -- there is -- there are a couple of matters.

22 Mr. -- Mr. Douglas is now at St. Lucie in protective  
23 custody. He was previously in West Palm Beach where he was in  
24 general population and was assaulted several times. I would  
25 ask if the Court could request that the marshals keep him in

1 St. Lucie where he can be in protective custody.

2 And also, Your Honor -- and I -- we went down this road  
3 before, but, Your Honor, he was asked -- he was prescribed a  
4 neck brace earlier and he has never received it. Again, I'd  
5 just ask if the Court could simply ask the medical staff to  
6 look at that, please.

7 THE COURT: These requests -- these sort of on-the-fly  
8 requests for medical attention or particular placement, they  
9 need to be made in the form of written motions with supporting  
10 details to provide context. I can't just rule in the abstract  
11 and start making recommendations about placement or medical  
12 services without more information.

13 So that's -- that's the Court's ruling at this time.  
14 It's premature and not properly filed.

15 MR. KIRBY: I will file something with Your Honor.  
16 Thank you.

17 THE COURT: Okay.

18 Anything from the government?

19 MR. SCHILLER: Thank you, Judge. Yes.

20 In regards to the admissibility of the underlying facts  
21 of the 2011 conviction, the only two witnesses the government  
22 would purport to have testify to that are both out of district,  
23 and we need to make travel arrangements for them. Does the  
24 Court anticipate letting us know before the end of the year  
25 or -- a trial time, if you know? And, if not, I understand. I

1 just -- I want to try to be able to -- because they're not law  
2 enforcement now, they're retired; so we need to make those  
3 travel arrangements for them.

4 THE COURT: It seems to me now the answer is no. If  
5 something were to change mid-trial, and there becomes -- it  
6 becomes evident that there is a need for the government to be  
7 able to present this evidence, then you would know. But I  
8 can't give you any additional forewarning other than that. So  
9 that's that.

10 MR. SCHILLER: Thank you, Judge.

11 MR. HOWES: Judge, if I -- excuse me. If I might,  
12 I -- I might have been wrong, and I will let the Court know. I  
13 have gone through 200 -- 352 of 1,091 pages of discovery. So I  
14 might have missed those -- those search warrants. So I just  
15 wanted the government to know if I'm wrong, I will tell them  
16 I'm wrong.

17 THE COURT: Okay. Well, then you all should confer  
18 about discovery. And if there is something you think you don't  
19 have yet, then I'm sure Mr. Schiller will provide it to you.

20 MR. SCHILLER: Absolutely, Your Honor.

21 THE COURT: Okay.

22 MR. HOWES: We have had no problems of that nature,  
23 Judge. We have actually been very courteous and professional  
24 in all these matters.

25 THE COURT: Okay. And just overall, Mr. Kirby, do you

1 have a sense that this is going to trial?

2 MR. KIRBY: Yes, Your Honor.

3 THE COURT: Okay. Thank you.

4 The Court is in recess.

5 (These proceedings concluded at 2:23 p.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

DATE: 01-22-2025 /s/Laura Melton  
LAURA E. MELTON, RMR, CRR, FPR  
Official Court Reporter  
United States District Court  
Southern District of Florida  
Fort Pierce, Florida



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